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In the Supreme Court of the United States

October Term, 1975
No. 75-775

MILTON J. SHAPP, Individually and as Governor of the Commonwealth of Pennsylvania, WILLIAM H. WILCOX, Individually and as State Fuel Allocation Officer of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General, Commonwealth of Pennsylvania, and the COMMONWEALTH OF PENNSYLVANIA, for Itself and on Behalf of Its Residents and Citizens,

Petitioners

v.

FRANK G. ZARB, Administrator, Federal Energy Office; JOHN W. WEBER, Assistant Administrator for Operations and Compliance, Federal Energy Office; JOSEPH A. LA SALA, Regional Administrator, Region III, Federal Energy Office; FEDERAL ENERGY OFFICE; ATLANTIC RICHFIELD CORPORATION; EXXON CORPORATION; SUN OIL COMPANY, INC.; GULF OIL CORPORATION; MOBIL OIL CORPORATION; TEXACO, INC.; AMOCO OIL COMPANY; ASHLAND OIL, INC. B P OIL CORPORATION; BP OIL, INC.; UNITED REFINING COMPANY; PHILLIPS OIL COMPANY; GETTY OIL COMPANY (EASTERN OPERATIONS); AMERADA HESS CORPORATION; CITIES SERVICE OIL COMPANY; AGWAY PETROLEUM CORPORATION; CHEVRON OIL COMPANY; PENNZOIL COMPANY; SHELL OIL CO.; CONTINENTAL OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; CROWN CENTRAL PETROLEUM CORPORATION; CHAMPLIN PETROLEUM COMPANY; CLARK OIL & REFINING CORPORATION; TEXAS CITY REFINING, INC.; PETROLEUM MARKETING CORPORATION; KERR-McGEE CORPORATION,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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TABLE OF CONTENTS

	Page
PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES:	1
I. Opinions Below	2
II. Jurisdiction	2
III. Questions Presented	3
IV. Statutory Provisions Involved	4
V. Statement of the Case	5
VI. Reasons for Granting the Writ:	
A. The question presented in this case is a matter of great public concern	8
B. The courts below erroneously decided the issues	10
C. The lower Court misconstrued and misapplied the doctrine enunciated by this court in Massachusetts v. Mellon	15
VII. Conclusion	18

APPENDIX:

1. Motion for Leave To File an Amended and Supplemental Complaint	1a-25a
2. First Amended Complaint	3a-18a
3. FEO's Motion To Certify Constitutional Question	26a-31a
4. District Court Memo, Opinion and Order, November 4, 1974	32a-43a

5. TECA Opinion 44a-48a
6. District Court Memo, Opinion and Order, April 24, 1975 .....49a-58a
7. TECA Opinion and Order 59a-64a
8. TECA Order Denying Reconsideration and Rehearing 65a
9. Emergency Petroleum Allocation Act of 1973 .....66a-91a
10. Statute Extending the Emergency Petroleum Allocation Act of 1973 to November 15, 1975 .....92a-95a
11. Washington Post—Tuesday, Sept. 30, 1975, Emergency Petroleum Allocation Act of 1975 signed into legislation by President Ford 96a-98a
12. Emergency Petroleum Allocation Act Extending to December 15, 1975 .....99a-125a
13. Economic Stabilization Act of 1970 .... 126a-146a

TABLE OF CITATIONS

CASES:

American President Lines, Ltd. v. S. Woolman, Inc., 239 F. Supp. 833 (S.D. N.Y., 1964) .. 15
Byrne v. Simon, C.A. No. 174-372 (D. N.J., filed March 19, 1975) 9
Commonwealth of Pennsylvania ex rel. Creamer v. United States Department of Agriculture, 469 F. 2d 1387 (3rd Cir. 1972) 12
Florida v. Weinberger, 492 F. 2d 488 (5th Cir. 1974) 12
Mandel v. Simon, 493 F. 2d 1239 (TECA 1974) 9
Massachusetts v. Laird, 400 U.S. 886 (1970) 17

Massachusetts v. Laird, 451 F. 2d 26 (1st Cir. 1971) 17
Massachusetts v. Mellon, 262 U.S. 447 (1923) 12, 15, 16, 17
New York v. United States, 326 U.S. 572 (1946) 9
Oklahoma v. Civil Service Commission, 330 U.S. 127 (1947) 17
Schlude v. Commissioner, 372 U.S. 128 (1963) .. 15
Shapp v. Simon (TECA No. 3-8, September 17, 1975) 2, 6, 13
South Carolina v. Katzenbach, 383 U.S. 301 (1966) 17
Thompson v. Louisville, 362 U.S. 199 (1960) .. 10
United States v. Carter, 171 F. 2d 530 (5th Cir. 1948) 15
United States v. Powell, 330 U.S. 238 (1947) .. 10
United States v. Ruzicka, 329 U.S. 287 (1946) .. 10
United States v. Standard Oil Co., 332 U.S. 301 (1946) 10
United States v. Zazove, 334 U.S. 602 (1948) .. 10
Washington v. F.C.C., 513 F. 2d 1142 (9th Cir. 1975) 12, 16, 17
Washington v. United States, 357 U.S. 348 (1958) 10
Wilkinson v. United States, 365 U.S. 399 (1961) 15
Williams v. Lee, 358 U.S. 217, 218 (1959) 11

STATUTES:

United States Code, Title 5:
§§701-706 5
United States Code, Title 12:
§1904 (Supp. 1975, Notes §§201 et seq.) 4, 5

United States Code, Title 15:
§§751 et seq. (as amended) 4, 13
§§753(b)(1)(F) 8
United States Code, Title 28:
§1254(1) 2
§§1331 and 1337 5
§§2201 and 2202 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-775

MILTON J. SHAPP et al.,
Petitioners

v.

FRANK G. ZARB et al.,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Milton J. Shapp, Governor of the Commonwealth of Pennsylvania et al., hereby petition that a writ of certiorari issue to review the judgment of the Temporary Emergency Court of Appeals entered in this case on October 30, 1975.

I. OPINIONS BELOW

The first opinion of the District Court is not reported and appears in the Appendix at 32a-43a. The opinion of the Temporary Emergency Court of Appeals, on the first appeal of this case is reported. *Shapp v. Simon,* 510 F. 2d 379 (TECA 1975), and appears in the Appendix at 44a-48a. The second opinion of the District Court, upon the remand of the Temporary Emergency Court of Appeals is not reported and appears in the Appendix at 49a-58a. The per curiam opinion of TECA upon the second appeal is not reported and appears in the Appendix at 59a-64a. The order of TECA of October 30, 1975, Judge Frank M. Johnson, Jr., dissenting, denying petitioners' request for reconsideration and rehearing is not reported and appears in the Appendix at 65a.

II. JURISDICTION

The judgment of the Temporary Emergency Court of Appeals was entered on September 18, 1975. A timely petition for reconsideration and rehearing was denied on October 30, 1975, and this petition for certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

III. QUESTIONS PRESENTED

I. Is this controversy moot?

A. Does a real and substantial controversy admitting of specific relief continue to exist by Congress' retroactive and prospective extension of the EPAA and the regulations promulgated thereunder?

B. Does the expiration of the EPAA render moot an enforcement proceeding which seeks to remedy injuries caused by violations of the Act and the regulations promulgated thereunder?

II. Does the Commonwealth of Pennsylvania have standing to sue?

A. Does the Commonwealth of Pennsylvania have standing as a state which has been delegated responsibility and authority by federal statutes and regulations, i.e., as part and parcel of the regulatory scheme?

B. Does the Commonwealth of Pennsylvania have standing on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders?

C. Does the Commonwealth of Pennsylvania have standing as a user of petroleum products? Is an administrative remedy available to plaintiffs and if so, is exhaustion required?

D. Does the Commonwealth of Pennsylvania have standing as a collector of revenues based on sales of petroleum products within its borders?

E. Does the Commonwealth of Pennsylvania have standing as *parens patriae?*

1. Is *Massachusetts v. Mellon* a bar to Pennsylvania's standing as *parens patriae?*

2. Has *Massachusetts v. Mellon* lost its vitality?

IV. STATUTORY PROVISIONS INVOLVED

United States Code, Title 12, §1904 (Supp. 1975, Notes §§201 *et seq.*)

United States Code, Title 15, §§751 *et seq.* (as amended).

V. STATEMENT OF THE CASE

Upon proof positive that FEA had, *inter alia*, grossly malapportioned the petroleum allocation to Pennsylvania, the Commonwealth, and its officials, commenced this action in the United States District Court for the Eastern District of Pennsylvania seeking injunctive relief against FEA and certain oil company defendants.[1] The jurisdiction of the district court was invoked *inter alia* pursuant to the Economic Stabilization Act of 1970, 12 U.S.C. §1904 (Supp. 1975, notes §210) and Section 5 of the Emergency Petroleum Allocation Act of 1973, P. L. 93-159.[2] After nearly two years of litigation and two appeals to TECA, Pennsylvania's standing to sue has still not been determined.

In general terms, Pennsylvania alleged that FEA had improperly calculated the allocation of petroleum to Pennsylvania's suppliers, that the oil company defendants violated FEA's regulations in violation to Pennsylvania, that FEA did not and continues not to properly enforce its regulations as to the oil company defendants, all to the detriment of Pennsylvania and those it represents. The

[1] Maryland and New Jersey also commenced separate actions against FEA asserting with Pennsylvania discrimination by FEA toward the entire Northeastern Seaboard in its petroleum allocation program. These actions, like Pennsylvania's, were stifled at early stages because of the undecided issue of standing of a state to sue a federal agency.

[2] The district court's jurisdiction was also invoked pursuant to 5 U.S.C. §§701-706, 28 U.S.C. §§1331, and 1337. Pursuant to 28 U.S.C. §§2201 and 2202, declaratory relief was also requested.

complaint alleged that wrongful conduct of the FEA and various oil companies had resulted in the improper diminution of the allocations of petroleum which FEA made available to the Commonwealth and other users of petroleum in Pennsylvania in violation of the congressional standards mandated in the Emergency Petroleum Allocation Act of 1973 ("EPAA" or "Act").

Each of the defendants, led by FEA, challenged the Commonwealth's standing to sue in the district court. FEA filed a motion to certify constitutional question, on the grounds that whether "Pennsylvania possesses standing to bring and maintain this action against the United States . . ." presents "a substantial constitutional issue." The district court's grant of FEA's certification motion was reversed by TECA, *Shapp v. Simon*, 510 F. 2d 379, 381 (1975), and remanded for consideration of statutory questions of standing before reaching the constitutional issue. On remand the lower court dismissed the Commonwealth's complaint for lack of standing on both statutory and constitutional grounds (App. 58a). The Commonwealth took a timely appeal to TECA. While the appeal was pending, but after the "expiration" of the Act, FEA moved to dismiss the appeal because of mootness. The Commonwealth opposed this motion on the grounds that its complaint was a "pending enforcement proceeding" seeking to vindicate rights created under the Act and to correct violations of the Act which had vested and accrued before the Act expired. Nonetheless, TECA dismissed the appeal by per curiam opinion holding that the expiration of the Act caused the controversy to become moot and that the "supervening mootness prevents us from reviewing the issue of standing." TECA vacated the district court's order dismissing the complaint for lack of

standing and remanded with directions to enter a new order of dismissal for mootness.

Congress and the President thereafter extended the life of the Act and regulations to November 15, 1975, and again subsequently extended the Act and regulations to December 15, 1975. Those extensions provide for the retroactive application of the Act and regulations to August 31, 1975, the date of the alleged "expiration". Thus, the Act remains intact today.

The Petitioners then filed with TECA a timely petition for reconsideration and rehearing asserting, that the Act and regulations never expired or, alternatively, assuming *arguendo* that they did expire, that the expiration could not extinguish rights and liabilities which had already accrued and which were the bases of the cause of action commenced prior to the alleged expiration of the Act. TECA denied that petition in an order dated October 31, 1975, Judge Frank M. Johnson, Jr., dissenting (App. 65a).

It is from the order of the TECA dismissing the complaint for mootness and the district court's order dismissing the complaint for want of standing that petitioners seek a writ of certiorari and the review of this Court.

VI. REASONS FOR GRANTING THE WRIT

A. The Question Presented in This Case Is a Matter of Great Public Concern

Pennsylvania stresses in the strongest possible terms that this action raises substantial and important questions. The energy crisis is not and will not be over in the short run and the issue of the standing of a state to compel proper conduct by the FEA and those it is charged with regulating will have increasing impact in the years to come. The extensions of the life of the Act and regulations indicate Congress' continuing concern with energy allocation and enforcement of the Act and regulations. Petitioners' action reflects this public concern.

Pennsylvania generally has asserted that under the Emergency Petroleum Allocation Act, §4(b)(1)(F), petroleum products are to be allocated equitably as to quantity and price among all regions and areas of the country and that in February and in March, 1974, the oil company defendants and FEA, in violation of the statutes and regulations, both acted and failed to act so that Pennsylvania received less than its proper share of petroleum products from the oil company defendants. As of the present date, those short allocations still have not been replaced. Moreover, Pennsylvania asserted that even though FEA's allocation to Pennsylvania was less than proper, the oil company defendants had failed to deliver the amount of petroleum products which FEA regulations had mandated. Additionally, Pennsylvania asserted that, because of the improper acts of FEA and the oil company defendants, petroleum prices charged in Pennsylvania were higher than those charged in other states and that even within Pennsylvania there was an improper disparity of petroleum prices. Pennsylvania also alleged that, with particular impact to and within Pennsylvania, oil company defendants were not complying with the timely filing requirements of the regulations; that oil company defendants had, by various direct and indirect means, accumulated hidden excess inventories; that oil company defendants were not complying with FEA regulations regarding inventories; and, that FEA was not enforcing its regulatory functions with regard to oil company inventories, all to the detriment of Pennsylvania and its citizens.

It cannot be gainsaid that to the extent that the allocation to Pennsylvania is inequitable, large numbers of Pennsylvanians and people passing through Pennsylvania are inequitably treated and harmed. That the Commonwealth suffers a harm also cannot be gainsaid. The Commonwealth of Pennsylvania urges in the strongest possible terms that the issues raised in this litigation are of great public concern and are appropriate for review by this Court. *Cf. New York v. United States,* 326 U.S. 572, 574 (1946).

The importance of the issues involved is demonstrated by the numerous cases brought by other states seeking redress of violations of the Act and regulations and asserting various grounds for standing. See, *e.g. Mandel v. Simon,* 493 F. 2d 1239 (TECA 1974); *Byrne v. Simon,* C.A. No. 174-372 (D. N.J., filed March 19, 1975). Hence, it is desirable that this Court render a definitive ruling as to whether a state does have standing to sue the federal government under the bases asserted by

the Commonwealth in its complaint. *Cf. United States v. Standard Oil Co.*, 332 U.S. 301, 302-03 n. 2 (1946); *United States v. Powell*, 330 U.S. 238, 240 (1947). Another significant factor for this Court to consider is that at stake in this litigation are millions of dollars in excess costs to Pennsylvania consumers due to the respondents' unlawful allocation of petroleum products in Pennsylvania. *Cf. United States v. Zazove*, 334 U.S. 602, 613-14 n. 17 (1948). Finally, there is presently pending no case on this Court's docket of which petitioners' counsel is aware, which raises these questions of importance in the administration of the EPAA. *Cf. United States v. Ruzicka*, 329 U.S. 287, 288 (1946).

This case presents an important issue, capable of repetition and evading review as the issue arose during a dire emergency, the recent Arab oil embargo, where the plaintiffs needed and were entitled to prompt relief but were unable to secure it because of the issue then and now presented of a state's standing to sue for the violation of federal statutes and regulations committed by a federal agency. Although the "dire circumstances" have presently abated, this Court should still consider this important question of standing, to avoid a two year delay in getting emergency relief when the issue next arises.

B. The Courts Below Erroneously Decided the Issues

Although it is conceded that this Court does not usually grant certiorari merely on the ground that the lower court incorrectly decided the issue; but see, *Thompson v. Louisville*, 362 U.S. 199 (1960); *Washington v. United States*, 357 U.S. 348 (1958); the erroneous nature

of the decision below along with the importance of the questions presented do suggest the appropriateness of the grant of certiorari in the instant case. *Cf. Williams v. Lee*, 358 U.S. 217, 218 (1959). That the correctness of the decisions below is open to serious question is an understatement, to say the least.

The petitioners' amended complaint[3] shows quite clearly that Pennsylvania asserted the following five independent theories of standing:

> (1) as a state which has been delegated responsibility and authority by federal statutes and regulations (10 C.F.R. 211, 15 *et seq.*, 39 Fed. Reg. 1935 (January 15, 1974) to allocate scarce petroleum products within Pennsylvania. (Amended Complaint, ¶6, 7, 22, 23, 55);
>
> (2) on behalf of itself, as it has responsibility for the health, safety, and welfare of persons within its borders (Amended Complaint, ¶6);
>
> (3) as a user of petroleum products (Amended Complaint, ¶6);
>
> (4) as a collector of revenues based on sales of petroleum products within its borders (Amended Complaint, ¶6); and
>
> (5) as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the defendants (Amended Complaint, ¶6).

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[3] Petitioners filed a motion for leave to file an amended and supplemental complaint (App. at 1a-2a), which amended complaint was considered by the district court in its opinion and order dismissing petitioners' action.

The district court erroneously stated that Pennsylvania asserted only *four* theories of standing (App. at 50a). The court never considered the first basis of standing: "as a state which has been delegated responsibility and authority by federal statutes and regulations . . . to allocate scarce petroleum products within Pennsylvania." The standing of a state which has been delegated responsibility and authority by federal statutes and regulations as an integral part of the regulatory scheme has been recognized in *Washington v. F.C.C.*, 513 F. 2d 1142 (9th Cir. 1975); *Florida v. Weinberger*, 492 F. 2d 488 (5th Cir. 1974); and *Commonwealth of Pennsylvania, ex rel. Creamer v. United States Department of Agriculture*, 469 F. 2d 1387 (3rd Cir. 1972). Yet the district court failed to consider this ground for standing, and summarily rejected three others. The court held that the only viable theory of standing for the Commonwealth was *parens patriae* (App. at 54a) and that *Massachusetts v. Mellon*, 262 U.S. 447 (1923), barred Pennsylvania from asserting that theory against the federal government. (The misapplication of *Mellon* to the instant case and the loss of vitality of *Mellon* are considered in the following section, *infra.*) The district court thereupon dismissed the action for want of standing (App. at 58a).

It is unfortunate indeed that the district court's misreading of petitioners' amended complaint left unanswered the important issues raised herein. The court of appeals compounded this error by not reaching the question of standing because it believed that the controversy had become moot during the pendency of the appeal due to the alleged expiration of the EPAA by its terms on August 31, 1975. TECA vacated the district court's order and remanded with direction to enter a new order of dismissal on the ground that the "expiration" of the Act rendered the controversy moot. *Shapp v. Simon*, (TECA No. 3-8, September 17, 1975) (App. at 59a-64a).

Congress subsequently extended the Act and regulations to November 15, 1975 (App. at 92a-95a). The President signed this legislation into law on September 29, 1975 (App. at 96a-98a). Sections 2 and 3 of that legislation respectively provide for the retroactive application of the Act and regulations to August 31, 1975, the date of the "expiration" of the original Act. Moreover Section 4 provides that "[d]uring the period of this extension it is the intent of the Congress that the status quo shall be maintained. . . ." This legislation was due to expire by its own terms on November 15, 1975. However, Congress has once again extended the Act and regulations to December 15, 1975. P. L. 94-133. The President signed this bill into law on November 14, 1975 (App. at 99a-125a).

In effect the Act and regulations never have expired. The remarks of Congressman Dingell on the floor of the House are pertinent:

> "Mr. Speaker, during previous consideration of an extension of the Emergency Petroleum Allocation Act the question of notice to all interested persons regarding the retroactive application of such an extension was debated. That debate indicated that it was the intent of Congress to extend the Allocation Act without hiatus and that any such extension would retroactively take effect. The extension we have passed today should be interpreted in light of this history and prior debate. As further indication

of this intent, I include as part of this statement the ruling of the Federal Energy Administration regarding retroactive extension of the Allocation Act:

. . .

"Judicial precedent supports the FEA's and the Congress' determination of that enactment of the EPAA of 1975 can lawfully reinstate the FEA's Mandatory Petroleum Allocation and Price Regulations as though they were continuously in force during the hiatus period, particularly where there was, as in this case, a clear expression of Congress's intention in this regard and extensive notice to the public that the EPAA of 1973 would be extended on a retroactive basis. See Porter v. Senderowitz, 158 F. 2d 435 (3rd Cir. 1946), *cert. denied,* 330 U.S. 848 (1947); Porter v. Shibe, 158 F. 2d 68 (10th Cir. 1946); Purvis v. United States, 501 F. 2d 311 (9th Cir. 1974); First National Bank v. United States, 420 F. 2d 725 (Ct. Cl.), *cert. denied,* 398 U.S. 950 (1970)."

TECA held, however, that the Act did expire and that "supervening mootness prevents us from reviewing the issue of standing." Although the legislation extending the Act was timely brought to the attention of TECA in petitioners' petition for reconsideration and rehearing, that court nonetheless summarily denied that petition, Judge Frank M. Johnson, Jr., dissenting. Despite Congress' clear intention to extend the Act and regulations without hiatus to December 15, 1975, the petitioners find themselves out of court due to the alleged expiration of the EPAA. Only review by certiorari can remedy this anomalous situation.

Assuming *arguendo* that, notwithstanding the clear intention of Congress and the President, the Act and regulations did somehow expire, Petitioners contend that a cause of action commenced and pending prior to this Act's expiration should not thereby be rendered moot. The expiration of a temporary statute does not, unless the statute provides otherwise, extinguish liability incurred while the statute was in effect. *United States v. Carter,* 171 F. 2d 530, 532 (5th Cir. 1948); *American President Lines, Ltd. v. S. Woolman, Inc.,* 239 F. Supp. 833, 838 (S.D. N.Y. 1964). The Act does not so provide. Moreover this action is a "pending enforcement proceeding" to enforce the allegedly expired statute in relation to violations occurring prior to the alleged expiration. This action should survive the alleged expiration of the EPAA and regulations.

C. The Lower Court Has Misconstrued and Misapplied the Doctrine Enunciated by This Court in Massachusetts v. Mellon [4]

The district court erroneously held that under "the barrier established in *Massachusetts v. Mellon,* 262 U.S. 447 (1923), . . . a state, as *parens patriae,* may not sue the federal government" (App. at 55a). The court apparently misconstrued *Mellon* to stand for the proposition that a state may *never* properly sue as *parens patriae* the federal government to protect its citizens from a violation of a federal statute and regulations. That proposition would then render the following language in *Mellon* a nullity:

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[4] See *Schlude v. Commissioner,* 372 U.S. 128, 130 (1963); *Wilkinson v. United States,* 365 U.S. 399, 401 (1961).

> "We need not go so far as to say that a State may never intervene by suit to protect its citizens against any form of enforcement of unconstitutional acts of Congress; but we are clear that the *right* to do so does not arise *here*." 262 U.S. at 485 (emphasis added).

It is submitted that the district court misapplied *Mellon* to the issues underlying the instant controversy. The Ninth Circuit in an action raising similar principles of law held:

> "The doctrine of Massachusetts v. Mellon is not applicable to this proceeding. Massachusetts had alleged that a federal statute was unconstitutional as a usurpation by Congress of power reserved to the states. As the Court pointed out in Georgia v. Pennsylvania Railroad, supra, Massachusetts sought to litigate a 'question of distribution of powers between the State and the national government' (324 U.S. at 445, 65 S. Ct. at 720), and 'protect her citizens from the operation of federal statutes' (*id.* at 447, 65 S. Ct. at 721). There are no such questions here. WUTC (an agency of the state), does not attack the constitutionality of the Communications Act on any ground; rather, it relies upon the federal statute, and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. That federal agency is not the only public body that may invoke judicial assistance to enforce the Act." *Washington v. F.C.C.*, 513 F. 2d 1142, 1153 (9th Cir. 1975).

Likewise, the Commonwealth in the case *sub judice* has neither challenged the constitutionality of the EPAA nor

the distribution of powers between the state and the national government. Rather the Commonwealth *relies* upon the EPAA and seeks to vindicate the congressional will by preventing what it asserts to be a violation of that statute by the administrative agency charged with its enforcement. Thus, the issues presented in this case bring it squarely within the limitation of *Mellon* as enunciated by the Ninth Circuit in *Washington v. F.C.C.*, 513 F. 2d 1142, 1153 (9th Cir. 1975).

Assuming *arguendo* that Pennsylvania's action *parens patriae* against the federal government is seemingly foreclosed by this Court's decision in *Massachusetts v. Mellon, supra,* it is submitted that that doctrine is ripe for reexamination and possible overruling or limitation.

This Court has already substantially limited the application of *Mellon* in *Oklahoma v. Civil Service Commission,* 330 U.S. 127, 129 (1947), and *South Carolina v. Katzenbach,* 383 U.S. 301 (1966). Mr. Justice Douglas' dissent in *Massachusetts v. Laird,* 400 U.S. 886, 887-91 (1970), properly observes at 889 that time has eroded the vitality of *Mellon.* The traditional theory that a state generally cannot sue the federal government *parens patriae* may be inadequate where the very claim is, as here, that the "parent" is injuring the "children". *Cf. Massachusetts v. Laird,* 451 F. 2d 26, 29 (1st Cir. 1971).

Generally speaking, the law of standing has been substantially liberalized since the relatively placid times of *Massachusetts v. Mellon.* The issues raised in the litigation underlying this petition for a writ of certiorari present this Court with the opportunity to reexamine and reevaluate the vitality of a doctrine enunciated over fifty years ago.

VII. CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Court should grant the petition for writ of certiorari in this case to review the judgment of the Temporary Emergency Court of Appeals of the United States and the dismissal of this action, without a hearing, by the District Court.

Respectfully submitted,

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APPENDIX

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INDEX TO APPENDIX

	PAGE
Motion for Leave To File an Amended and Supplemental Complaint	1a
Exhibit A—First Amended Complaint	3a
FEO's Motion To Certify Constitutional Question	26a
District Court—Memorandum Opinion and Order —Dated November 4, 1974	32a
Temporary Emergency Court of Appeals Opinion —Dated January 13, 1975	44a
District Court—Memorandum Opinion and Order —Dated April 24, 1975	49a
Temporary Emergency Court of Appeals Opinion and Order—Dated September 18, 1975	59a
Temporary Emergency Court of Appeals Order Denying Reconsideration and Rehearing—Dated October 30, 1975	65a
Emergency Petroleum Allocation Act of 1973	66a
Statute Extending the Emergency Petroleum Allocation Act of 1973 to November 15, 1975	92a
Washington Post—Tuesday, Sept. 30, 1975, Emergency Petroleum Allocation Act of 1975 Signed Into Legislation by President Ford	96a
Statute Extending the Emergency Petroleum Allocation Act of 1973 to December 15, 1975	99a
Economic Stabilization Act of 1970	126a

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp et al.,
Plaintiffs

v.

William E. Simon et al.,
Defendants

MOTION FOR LEAVE TO FILE AN AMENDED AND SUPPLEMENTAL COMPLAINT

Pursuant to Rule 15(a) FRCP, Plaintiffs respectfully seek leave to file the First Amended Complaint, attached hereto as Exhibit "A."

(1) The First Amended Complaint makes technical corrections regarding corporate identities, corporate names, places of incorporation. It also adds oil company defendants inadvertently omitted from the Complaint. It also adds new and different federal defendants because of personnel changes and because discovery and investigation has shown that additional persons are responsible for the harm caused to Plaintiffs.

(2) The First Amended Complaint clarifies Counts I and II of the Complaint and supplements it by alleging occurrences which happened after the Complaint was filed.

(3) The First Amended Complaint is more specific regarding incorrect and untimely information from the oil company defendants.

(4) The First Amended Complaint is more specific regarding the failure of the FEO Defendants, in violation of the law, to effectuate equitable allocation of prices for petroleum products.

(5) The First Amended Complaint is more specific and meets more clearly the defenses raised by motion and answer regarding standing, the non-necessity of the joinder of other parties, and the non-necessity of exhaustion of administrative remedies.

WHEREFORE, Plaintiffs respectfully request that they be granted leave to file the First Amended Complaint because of lack of prejudice to Defendants and because to do so would aid in a speedier disposition of the issues before this Court, would avoid a multiplicity of suits and, therefore, it is in the best interests of justice that the Motion be granted.

Respectfully submitted,

(s) Lawrence Silver
Deputy Attorney General
Chief, Civil Litigation
James R. Adams
Deputy Attorney General
Israel Packel
Attorney General
Commonwealth of Pennsylvania
Attorneys for Plaintiffs

Department of Justice
Capitol Annex
Harrisburg, Pa. 17120
(717) 787-4099

EXHIBIT A

[CAPTION]

FIRST AMENDED COMPLAINT

Jurisdiction

1. The jurisdiction of this court arises under 5 U.S.C. §§701-706, 28 U.S.C. §§1331, 1337 and 1361 and under Section 210 of the Economic Stabilization Act of 1970, as amended, see Note 12 U.S.C. §1904, and Section 5 of the Emergency Petroleum Allocation Act of 1973, P. L. 93-159, in that:

a. This is a civil action wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, Laws, or Treaties of the United States;

b. This is a civil action or proceeding arising under an act of Congress regulating commerce; and

c. This is an action by persons suffering legal wrong and adversely affected or aggrieved by action and/or inaction of a federal agency and entitled to judicial review thereof.

d. This is an action in the nature of mandamus to compel an officer or employee of the United States or an agency thereof to perform a duty owed to Plaintiffs.

2. Declaratory and injunctive relief is sought pursuant to 28 U.S.C. §§2201 and 2202 and the statutes referred to above in Paragraph 1.

Parties

3. Plaintiff Milton J. Shapp is Governor of the Commonwealth of Pennsylvania.

4. Plaintiff William H. Wilcox is the State Fuel Allocation Officer for the Commonwealth of Pennsylvania (10 C.F.R. §211.15, 39 Fed. Reg. 1935 (January 15, 1974)).

5. Plaintiff Israel Packel is the Attorney General of the Commonwealth of Pennsylvania.

6. Plaintiff Commonwealth of Pennsylvania is a state of the United States and sues on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders, as a user of petroleum products, as a collector of revenues based upon sales of petroleum products within its borders, and as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the defendants.

7. Plaintiff Pennsylvania, pursuant to the Petroleum Allocation Act of 1973 and the regulations promulgated pursuant thereto (10 C.F.R. §211.15 *et seq.*, 39 Fed. Reg. 1935 (January 15, 1974)), has established a state office of petroleum products allocation and is exercising the authority granted to Pennsylvania, by such Act and regulations, through Plaintiff William H. Wilcox.

8. Defendant William E. Simon was Administrator and Defendant John C. Sawhill now is the Acting Administrator of the Federal Energy Office and, pursuant to Federal Executive Order 11748 dated December 4, 1973, the Administrator of the Federal Energy Office has been delegated all authority vested in the President of the

United States under the Emergency Petroleum Allocation Act of 1973 (P. L. 93-159), the Economic Stabilization Act of 1970 (P. L. 91-379), as amended, the Defense Production Act of 1950 (50 U.S.C. §2061 *et seq.*), and other provisions not relevant hereto. By virtue of said Executive Order, Defendant Simon had and Defendant Sawhill now has ultimate authority over the distribution of all petroleum products, including motor gasoline and heating oil, within the United States.

9. Defendant Gerald L. Parsky is the Executive Assistant to the Administrator of the Federal Energy Office and as such he exercises the power and responsibility delegated to him by the Administrator.

10. Defendant William N. Walker is the General Counsel of the Federal Energy Office and Defendant David G. Wilson is a Deputy General Counsel.

11. Defendant Duke R. Ligon is the Assistant Administrator for Policy Planning and Regulation of the Federal Energy Office.

12. Defendant John W. Weber is an assistant administrator of the Federal Energy Office with responsibility for operations and compliance.

13. Defendant Joseph S. LaSala is the Regional Administrator for Region III of the Federal Energy Office. Pennsylvania is part of Region III and Defendant LaSala exercises responsibility, on behalf of the other FEO Defendants, over the distribution of petroleum products within the Commonwealth of Pennsylvania.

14. Defendant Federal Energy Office (hereinafter referred to as "FEO") is an agency of the government of

the United States, which agency through its officers has been delegated the authority of the President relating to the allocation of petroleum products.

15. Defendant Simon had and Defendants Sawhill, Parsky, Walker, Wilson, Ligon, Weber and LaSala, and their successors in office, now have the duty, authority and responsibility for the effectuation and enforcement of and the compliance with the Emergency Petroleum Allocation Act of 1973, and the regulations promulgated and about to be promulgated pursuant thereto, together with the effectuation and enforcement of the compliance with other applicable laws of the United States and the Constitution of the United States.

16. Defendants Simon, Sawhill, Parsky, Walker, Wilson, Ligon, Weber and LaSala, are sued in their official capacities and any successors to their official positions with the Federal Energy Office are also sued herein. These defendants and Defendant Federal Energy Office are sometimes hereinafter referred to as "FEO Defendants".

17. Defendants, Agway Petroleum Corporation (a Delaware corporation), Amerada Hess Corporation (a Delaware corporation), Amoco Oil Company (a Maryland corporation), Ashland Oil Inc. (a Kentucky corporation), Atlantic Richfield Corporation (a Pennsylvania corporation), BP Oil Inc. (an Ohio corporation), Champlin Petroleum Company (a Delaware corporation), Chevron Oil Company (a California corporation), Cities Service Oil Company (a Delaware corporation), Clark Oil & Refining Corporation (a Wisconsin corporation), Continental Oil Company (a Delaware corporation), Crown Central Petroleum Corporation (a Maryland corporation), Exxon Corporation (a Delaware corporation), Getty Oil Company (Eastern Operations) (a Delaware corporation), Gulf Oil Corporation (a Pennsylvania corporation), Marathon Oil Company (an Ohio corporation), Mobil Oil Corporation (a New York corporation), Pennzoil Company (a Delaware corporation), Petroleum Marketing Corporation (a Delaware corporation), Phillips Petroleum Company (a Delaware corporation), Quaker State Oil Refining Corporation (a Delaware corporation), Shell Oil Company (a Delaware corporation),

Sun Oil Company of Pennsylvania (a Pennsylvania corporation), Swann Oil Inc. (a Pennsylvania corporation), Tenneco Oil Company (a Delaware corporation), Texaco Inc. (a Delaware corporation), Texas City Refining, Inc. (a Delaware corporation), Triangle Refineries Inc. (a Delaware corporation), Union Oil Company of California (a California corporation), United Refining Company (a Pennsylvania corporation) and Witco Chemical Company Inc. (a Delaware corporation) are all corporations engaged in the distribution and/or sale of petroleum products within the Commonwealth of Pennsylvania.

18. The defendants listed in Paragraph 17 hereof are sometimes hereinafter referred to as "oil company defendants".

Count I

19. Congress enacted the Emergency Petroleum Allocation Act of 1973 and the Act was signed by the President on November 27, 1973. Congress in the en-

actment made the following findings and declared the purpose of the legislation.

Findings and Purpose

Sec. 2 (a) The Congress hereby determines that—

(1) Shortages of crude oil, and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) Such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) Such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this Act is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this Act shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy.

20. The Emergency Petroleum Allocation Act of 1973 and regulations promulgated pursuant thereto provide for an allocation of petroleum products to all regions and areas within the United States. Section 4(b)(F) of that Act and Executive Order 11748 require that the allocation distribution of petroleum products, including motor gasoline, be equitable. The next few paragraphs of this Complaint set forth, in brief detail, the general steps of that allocation procedure and practice.

21. Suppliers of petroleum products were required to determine the identity of purchasers of those products, and the volume of such purchases in the base year, 1972, 10 C.F.R. §211.12. After making adjustments for growth, 10 C.F.R. §211.13, the suppliers were and for each month are required to calculate an allocation fraction by dividing the allocable supply of petroleum products for the month by that supplie·'s base period volume in the corresponding month, 10 C.F.R. §211.11.

22. The state set aside, provided for in 10 C.F.R. §211.17, is a percentage, 3% for motor gasoline, of the supplier's allocable supply and is subtracted from the figure before the supplier's allocation fraction is calculated, 10 C.F.R. §211.11. That state set aside is to be made available for delivery to areas within a state to abate emergencies and hardships upon the order of the State Fuel Allocation Officer.

23. The petroleum suppliers are required to estimate production of petroleum products for the up-coming

month, calculate both the state set aside and their allocation fraction, and report these figures to the FEO national and regional offices and to the State Fuel Allocation Officer on an FEO Form 1000 (a copy of which is attached hereto as Exhibit "A"), 10 C.F.R. §211.222. This report must be filed no later than 10 days prior to the beginning of the succeeding month, 10 C.F.R. §211.222 (b); 39 Fed. Reg. 10236.

24. As a practice and allegedly in pursuance of its duty to equitably allocate petroleum products in all areas and regions of the United States, FEO Defendants review the allocations of the suppliers and if customers in any state are below an FEO determined minimum allocation fraction, FEO issues an "injection order" to certain petroleum suppliers to bring a state (petroleum customers within a state) up to minimum allocation levels. As a practice, the extra petroleum to comply with an injection order comes not from allocations to other states, but from inventory.

25. As a practice and allegedly in pursuance of its duty to equitably allocate petroleum products in all areas and regions of the United States, FEO Defendants calculate a monthly minimum allocation fraction by dividing that month's allocable supply by the consumption of fuel in the corresponding month in 1972, adjusted to account for motor vehicle growth and agricultural use.

26. FEO Defendants have utilized the Lundberg Survey, a private consulting firm's estimation of 1972 per month consumption of fuel by states, in calculating the minimum allocation fraction, unless other figures are supplied by states.

27. On March 1, 1974, at FEO's request, Pennsylvania sent to FEO by Western Union Telegram, Pennsylvania's 1972 fuel tax figures. A copy of that telegram is attached hereto and made a part hereof as Exhibit "B".

28. Contrary to the action of FEO in using a state's fuel tax figures, if supplied, FEO failed to use Pennsylvania's fuel tax figures and relied on the Lundberg Survey in the calculation of Pennsylvania's minimum allocation fraction for March.

29. After several adjustments, Pennsylvania's allocation fraction for March was 85%, the lowest minimum allocation fraction in the Nation.

30. This minimum allocation fraction utilized by FEO required that oil company defendants were required to deliver into Pennsylvania a minimum of 376.1 million gallons of motor gasoline.

31. On March 21, 1974, Plaintiff, Governor Milton J. Shapp, hand-delivered an additional copy of the telegram of March 1, 1974, to Defendant Simon and to other FEO Defendants, at a meeting in Washington D.C.

32. On March 22, 1974, Counsel for the Plaintiffs, Lawrence Silver, by letter hand-delivered and telecopied to FEO that day, requested that FEO use Pennsylvania's Fuel Tax figures as a basis for calculation of the minimum allocation fraction and, in addition, suggested a formula for the use of those figures. That letter is attached hereto and made a part hereof as Exhibit "C".

33. On March 23, 1974, the FEO, through its counsel, refused to honor the request contained in the letter of March 22, 1974.

34. Pennsylvania's fuel tax figures were never used by FEO in the calculation of the minimum allocation fraction for March 1974.

35. By letter dated April 12, 1974, but not delivered until the day of depositions in the case, April 16, 1974, FEO basically agreed that the request contained in Silver's letter of March 22, 1974 was a fair and equitable basis for calculating Pennsylvania's minimum allocation fraction. FEO claims that its letter of April 12, 1974, set out a formula that is fair and equitable. But, nevertheless, FEO refused an oral request to apply that formula as contained in the letters to Pennsylvania's March allocation.

36. If the formula contained in the FEO letter of April 12, 1975, were applied for March, (as it was requested to do in March), the minimum allocation fraction for Pennsylvania would have required the defendant oil companies to deliver a minimum of 411.2 million gallons of motor gasoline to Pennsylvania consumers in March.

37. From the FEO Forms 1000 filed in April, the defendant oil companies have, under penalty of law, stated that they, in fact, delivered 363.7 million gallons of motor gasoline to Pennsylvania in March, 1974.

38. The delivery of 363.7 million gallons of motor gasoline to Pennsylvania in March is 12.4 million gallons less than FEO ordered the defendant oil companies to deliver and 47.5 million gallons less than FEO had admitted was a fair and equitable allocation of motor gasoline to Pennsylvania for March, 1974.

39. The failure of Pennsylvania, and the persons and entities it represents, to receive its fair and equitable

allocation of motor gasoline, has had and shall have an immediate and continuing adverse impact on and cause harm to the health, safety and welfare of Pennsylvania.

Count II

40. The Emergency Petroleum Allocation Act of 1973 requires, §4 (b) (1) (F), that FEO provide for (emphasis added):

> equitable distribution of crude oil, residual fuel oil and refined petroleum products at *equitable prices* among all regions and areas of the United States and sections of the petroleum industry, including independent refiners, small refiners, nonbranded independent markets, branded independent marketers, and among all users.

41. FEO Defendants, specifically Defendants Simon, Sawhill, Parsky, and Ligon, among others, are ideologically opposed to price control regulation of oil companies and, more specifically, they are opposed to price or allocation controls to effect equitable price distribution of petroleum products, including motor gasoline.

42. Pursuant to that ideological objection, FEO Defendants have refused and failed to carry out the mandate of Congress contained in Section 4 (b) (1) (F) of the Emergency Petroleum Allocation Act of 1973.

43. FEO Defendants have refused and failed to promulgate or put into effect any regulation or order to effectuate the mandate of Congress that equitable pricing be achieved among areas and regions and among various refiners, marketers and users.

44. One consequence of this intentional refusal and failure to follow the law is that purchasers of petroleum products in Pennsylvania have been and will be paying a higher price for those products than purchasers in other states.

45. Another consequence of this intentional refusal and failure to follow the law is that purchasers of petroleum products in Pennsylvania, notably No. 2 fuel oil, whose suppliers depend upon crude oil sources (foreign, new, released or stripper crude) not initially subject to price controls, will pay a price 50 to 100% higher than those purchasers whose suppliers depend upon controlled crude oil sources.

Count III

46. As hereinbefore alleged, oil company defendants are required to file, *inter alia,* FEO Forms 1000 with the State Fuel Allocation Officer, and with the national and regional offices of FEO, no later than 10 days before the beginning of each month. 10 C.F.R. §211.222(b); 39 Fed. Reg. 10236.

47. The FEO Form 1000 is the basic working document which FEO and the State Fuel Allocation Officer need and depend upon in making critical decisions regarding fuel allocation.

48. The timely filing and the accuracy of the information contained in the FEO Form 1000 is essential for proper decision-making and review of the allocation program, by both FEO officials and state officials.

49. The oil company defendants have not timely filed FEO Forms 1000 for the months of February, March, and April. Considering their prior non-compliance, it is believed and therefore averred that unless ordered to do so by this Court, the oil company defendants will not timely file their FEO Forms 1000 in the future.

50. The oil company defendants have not completed the FEO Forms 1000 and have not completed the FEO Forms 1000 accurately. Considering their prior incompletion and inaccurate completion, it is believed and therefore averred that, unless ordered to do so by this Court, the oil company defendants will not complete or accurately complete the FEO Forms 1000 in the future.

51. From time to time, the oil company defendants amend the FEO Forms 1000 which had been previously filed. It has been the practice of the oil company defendants to amend the FEO Forms 1000 long after the change in information is known and at a date which is so late in the month t[illegible], *inter alia,* the State Fuel Allocation Officer cannot utilize the state set aside with the same efficiency as would be achieved if the information were timely filed.

Count IV

52. The regulations, 10 C.F.R. §211.22(a), promulgated pursuant to the Emergency Petroleum Allocation Act of 1973, provide and require that the oil company defendants must not accumulate inventories of crude oil or petroleum products, and they provide further that if the oil company defendants do accumulate such inventories in excess of normal business practices, that FEO Defendants are required to order a disgorgement of the excess inventories.

53. The oil company defendants have accumulated inventories of crude oil and petroleum products in excess of normal inventory practices and, further, FEO, for reasons not apparent, have failed to order the oil company defendants to disgorge themselves of such excess inventories.

Count V

54. Plaintiffs, in various ways, are charged with the responsibility of protecting the health, safety and welfare of persons within the Commonwealth of Pennsylvania.

55. In addition, Plaintiffs, in various ways, are charged with certain responsibilities and duties in the administration of both state and federal laws, especially laws relating to the allocation and use of petroleum products, including motor gasoline and home heating oil.

56. In addition, Plaintiffs have the responsibility and duty, under our system of federalism, to protect persons within Pennsylvania from improper, illegal, and harmful actions of federal officials.

57. In addition, Plaintiffs have the responsibility and duty, constitutional and statutory, to protect persons within Pennsylvania from improper, illegal and harmful actions of persons and entities who affect Pennsylvania's commerce.

58. In order to fulfill these responsibilities and duties, especially in the administration of state and federal laws relating to the allocation of petroleum products including motor gasoline and home heating oil, Plaintiffs need information in the exclusive possession and control of both FEO Defendants and the oil company defendants.

59. Plaintiffs have made demands for information which is necessary for them to carry out the responsibilities and duties set forth above. Those demands have been refused, denied and ignored by FEO Defendants and the oil company defendants.

60. Plaintiffs have no adequate remedy at law.

Wherefore, Plaintiffs respectfully request that this Court:

(a) Order the oil company defendants to deliver to their Pennsylvania customers that additional amount of motor gasoline which this Court finds to be the amount Pennsylvania should have received, by law, in March, 1974.

(b) Order the FEO Defendants to calculate Pennsylvania's minimum allocation fraction for March of 1974, utilizing Pennsylvania's fuel tax data in accordance with the letters of March 22, 1974 and April 12, 1974, and upon that calculation order FEO Defendants to issue an injection order to the oil company defendants to deliver to their Pennsylvania customers that additional amount of motor gasoline.

(c) Order the FEO Defendants to promulgate and put into effect all regulations, rules and orders necessary or helpful in effectuating Section 4 (b) (1) (F) of the Emergency Petroleum Allocation Act of 1973.

(d) Order the oil company defendants to timely and accurately file the FEO Form 1000, and if amendment thereto is necessary to file accurate amendments within 24 hours after the information necessitating the amendment becomes available.

(e) Order the oil company defendants to disgorge excess inventories accumulated in violation of law.

(f) Order FEO Defendants to adopt satisfactory audit procedures to determine whether oil company defendants, including their domestic and foreign affiliates, are accumulating excess inventories.

(g) Order Defendants to provide Plaintiffs with timely and accurate information, necessary and helpful in carrying out the public responsibilities with which Plaintiffs are charged.

(h) Grant such other relief as may be necessary to effectuate the other orders of this Court and such additional relief as may be necessary and just under the circumstances.

(s) Lawrence Silver
Deputy Attorney General
Chief, Civil Litigation
James R. Adams
Deputy Attorney General
Israel Packel
Attorney General
Commonwealth of Pennsylvania

Department of Justice
Capitol Annex
Harrisburg, Pa. 17120
(717) 787-4099

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al.,
Plaintiffs,

v.

William E. Simon, et al.,
Defendants.

ORDER GRANTING PLAINTIFFS LEAVE TO FILE FIRST AMENDED COMPLAINT

And Now, this day of , 1974, and upon Plaintiffs' Motion for Leave To File Amended and Supplemental Complaint, It Is Ordered that Plaintiffs shall be and hereby are granted leave to file Exhibit "A" to that Motion, First Amended Complaint, and that Defendants shall move, answer or otherwise plead to the First Amended Complaint by the day of , 1974.

Joseph S. Lord, III,
Chief Judge

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al.,

Plaintiffs,

v.

William E. Simon, et al.,

Defendants.

NOTICE OF MOTION

To: Counsel listed on the attached Schedule A.

Please take notice that the enclosed Motion For Leave To File An Amended Complaint will be mailed for filing on Monday, May 13, 1974.

Dated: May 6, 1974.

(s) Lawrence Silver
Deputy Attorney Ceneral
Chief, Civil Litigation
James R. Adams
Deputy Attorney General
Israel Packel
Attorney General
Commonwealth of Pennsylvania
Department of Justice
Capitol Annex
Harrisburg, Pennsylvania 17120
(717) 787-4099

Schedule A

FEO Defendants

Allen W. Hausman, Esquire, U. S. Department of Justice, Room 3730, 9th & Pennsylvania Ave., N. W., Washington, D. C. 20530 (202) 739-4776.

FEO Defendants

Gary Tilles, Esquire, Assistant U. S. Attorney, U. S. Dept. of Justice, Eastern District of Pennsylvania, Fourth Floor, U. S. Courthouse, 9th & Market Streets, Philadelphia, Pennsylvania 19107 (215) 597-9469.

Agway Petroleum Corporation

Carter Anderson, Esquire, Rawle & Henderson, 2100 Packard Building, Philadelphia, Pennsylvania 19102 (215) L09-2500.

Amerada Hess Corporation

John P. McConnell, Morgan, Lewis & Bockius, 2107 The Fidelity Building, Philadelphia, Pennsylvania 19109 (215) 491-9413.

Amoco Oil Company

Alfred W. Cortese, Jr., Esquire, 1600 Three Penn Center, Philadelphia, Pennsylvania 19102 (215) 568-1600.

Ashland Oil, Inc.

Fred W. Drogula, Esquire, Ginsburg, Feldman & Bress, 1700 Pennsylvania Ave., N. W., Washington, D. C. 20006 (202) 223-3800.

Atlantic Richfield Company

Robert M. Landis, Esquire, Dechert, Price & Rhoads, 1600 Three Penn Center, Philadelphia, Pennsylvania 19102 (215) L08-1600.

Champlin Petroleum Company

Cecil E. Munn, Esquire, Cantey, Hanger, Gooch, Cravens & Munn, 1800 First National Building, Fort Worth, Texas 76102 (817) 332-7561.

Cities Service Oil Company

Carter Anderson, Esquire, Rawle & Henderson, 2100 Packard Building, Philadelphia, Pennsylvania 19102 (215) L09-2500.

Clark Oil & Refining Corp.

Peter R. McEnroe, Esquire, 8530 West National Avenue, Milwaukee, Wisconsin, 53227 (414) 321-5100.

Continental Oil Company

Edward N. Sherry, Esquire, Dewey, Ballantine, Bushby, Palmer & Wood, 140 Broadway, New York, N. Y. 10005 (212) 344-8000.

Crown Central Petroleum Corp.

John G. Harkins, Jr., Esquire, Barbara W. Mather, Esquire, Pepper, Hamilton & Scheetz, 2001 The Fidelity Building, Philadelphia, Pennsylvania 19109 (215) K15-1234.

Exxon Corporation

Benjamin M. Quigg, Jr., Esquire, 2107 Fidelity Building, Philadelphia, Pennsylvania 19109 (215) 491-9251.

Getty Oil Company (Eastern Operations)

Richard G. Schneider, Esquire, Stephen A. Stack, Esquire, Dechert, Price & Rhoads, 1600 Three Penn Center, Philadelphia, Pennsylvania 19102 (215) 568-1600.

Gulf Oil Corporation

Hoyt H. Harmon, Jr., Esquire, P. O. Box 8056, Philadelphia, Pennsylvania 19101 (215) TE9-6111.

Kerr-McGee Corporation

Thomas W. Johnston, Esquire, Chadwell, Kayser, Ruggles, McGee & Hastings, 135 S. LaSalle Street, Chicago, Illinois 60603 (312) 726-2545.

Kerr-McGee Corporation

Patrick T. Ryan, Esquire, 1100 Philadelphia National Bank Building, Philadelphia, Pennsylvania 19107 (215) 491-7307.

Mobil Oil Corporation

John C. Detweiler, Esquire, Suite 400, Four Penn Center Plaza, Philadelphia, Pennsylvania 19103 (215) MA7-7000.

Pennzoil Company

Edmund K. Trent, Esquire, Reed, Smith, Shaw & McClay, 747 Union Trust Building, Pittsburgh, Pennsylvania 15230 (412) 288-3131.

Petroleum Marketing Corporation

Samuel E. Dennis, Esquire, Meltzer & Schiffrin, 1500 Walnut Street, Philadelphia, Pennsylvania 19102 (215) KI6-6200.

Phillips Petroleum Company

Thomas N. O'Neill, Jr., Esquire, Montgomery, McCracken, Walker & Rhoads, Three Parkway, Philadelphia, Pennsylvania 19102 (215) LO3-0650.

Shell Oil Company

William Simon, Esquire, Keith E. Pugh, Jr., Esquire, John R. Fornaciari, Esquire, Howrey, Simon, Baker & Murchison, 1730 Pennsylvania Ave., N. W., Washington, D. C. 20006 (202) 872-8800.

Sohio Petroleum Company, B P Oil Inc., Chevron Oil Company, Union Oil Company of California.

George P. Williams, III, Esquire, Schnader, Harrison, Segal & Lewis, 1719 Packard Building, Philadelphia, Pennsylvania 19102 (215) 491-0400.

Sun Oil Company

Robert M. Dubbs, Esquire, Office of the General Counsel, 240 Radnor-Chester Road, St. Davids, Pennsylvania 19087 (215) 985-1600.

Texaco Inc.

G. Kenneth Handley, Esquire, Texaco Inc., 1040 Kings Highway North, Cherry Hill, New Jersey 08002.

Texas City Refining Inc.

Edwin S. Mabry, Esquire, Mabry & Gunn, 711 6th Street North, Texas City, Texas 77590 (713) 948-4466.

United Refining Company

James J. Restivo, Jr., Esquire, 747 Union Trust Building, Pittsburgh, Pennsylvania 15230 (412) 288-3122.

Shell Oil Company

John T. Clary, Esquire, 405 Witherspoon Building, Juniper & Walnut Streets, Philadelphia, Pa. 19106 (215) KI6-8992.

FEO Defendants

Ezra Levine, Esquire, Office of the General Counsel, Federal Energy Office, New Post Office Building, 12th and Pennsylvania Ave., N. W., Washington, D. C. 20461 (202) 961-8302.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al., *Plaintiffs,*

v.

William E. Simon, et al., *Defendants.*

CERTIFICATE OF SERVICE

I, Lawrence Silver, being a Deputy Attorney General of the Commonwealth of Pennsylvania and counsel for Plaintiffs, hereby certify that I have served Defendants with Plaintiffs' Motion For Leave To File An Amended Complaint by mailing copies thereof this 6th day of May, 1974, by United States mail postage prepaid, to all counsel of record as listed on Schedule A which is attached to the Notice Of Motion.

Dated: May 6, 1974.

(s) Lawrence Silver
Deputy Attorney General
Chief, Civil Litigation

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al.,

Plaintiffs,

v.

William E. Simon, et al.,

Defendants.

MOTION TO CERTIFY CONSTITUTIONAL QUESTION

Defendants William E. Simon, Administrator [now John C. Sawhill, Administrator-designee], John W. Weber, Joseph A. LaSala and Federal Energy Office, respectfully move this Court for an order pursuant to Section 5 of the Emergency Petroleum Allocation Act of 1973 and Section 211 (c) of the Economic Stabilization Act of 1970, as amended, certifying to the Temporary Emergency Court of Appeals to the United States the following substantial constitutional issue:

> Whether plaintiff Milton J. Shapp, Governor of the Commonwealth of Pennsylvania, William H. Wilcox, State Fuel Allocation Officer, Israel Packel, Attorney General and the Commonwealth of Pennsylvania possess standing to bring and maintain this action against the United States of America, its agencies and employees in their official capacity.

The Court is respectfully referred to the Memorandum of Law submitted in support of this motion.

Respectfully submitted,

(s) Carla A. Hills
Assistant Attorney General

5/29

Received
May 29, 1974
Litigation Section
Referred

Robert E. J. Curran
United States Attorney
Gary Tilles
Assistant United States Attorney

(s) Stanley D. Rose
(s) Allen W. Hausman
Attorneys, Department of Justice
Attorneys for Defendants

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al.,

Plaintiffs,

v.

William E. Simon, et al.,

Defendants.

ORDER AND CERTIFICATE

Upon the motion of defendants William E. Simon, Administrator of the Federal Energy Office (FEO) [now, John C. Sawhill, Administrator-designate], and the papers filed herein, this Court makes the following findings:

(a) The plaintiffs herein are the Commonwealth of Pennsylvania, its Governor, Attorney General and State Fuel Allocation Officer.

(b) The defendants herein are:

(1) The Federal Energy Office, an agency of the United States of America, its Administrator and various subordinate officers.

(2) Petroleum companies registered to do business in the Commonwealth of Pennsylvania.

(c) This action was commenced by the filing of a complaint and the issuance of an order to show cause on March 20, 1974.

(d) Plaintiffs have alleged in their complaint and amended complaint that the Federal Energy Office has acted arbitrarily and capriciously, and in violation of the standards of the Emergency Petroleum Allocation Act of 1973, in preparing allocations for gasoline for distribution to retail service stations located in the Commonwealth of Pennsylvania for the months of February, March, April and May, 1974 and in permitting prices charged for gasoline to be higher in Pennsylvania than elsewhere in the United States; it is further alleged that FEO has failed to implement procedures to audit the records of oil companies; as to defendant oil companies, plaintiffs have alleged that they have failed to completely deliver monthly allocations and have failed to submit required data in a complete and timely fashion.

(e) A substantial constitutional issue exists concerning the standing of plaintiffs to bring and maintain this action as against the United States of America, its agencies or employees in their official capacity.

(f) The provisions of Section 211 of the Economic Stabilization Act of 1970 and Section 5 of the Emergency Petroleum Allocation Act of 1973 are applicable in this matter.

IT IS THEREFORE ORDERED THAT:

1. The following issue is certified to the Temporary Emergency Court of Appeals of the United States:

Whether plaintiffs Milton J. Shapp, Governor of the Commonwealth of Pennsylvania, William H.

Wilcox, State Fuel Allocation Officer, Israel Packel, Attorney General and the Commonwealth of Pennsylvania possess standing to bring and maintain this action against the United States of America, its agencies and employees in their official capacity.

2. The Clerk of this Court shall transmit a certified copy of this Order and Certificate to the Clerk of the Temporary Emergency Court of Appeals of the United States.

Dated:

United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al.,
Plaintiffs

v.

William E. Simon, et al.,
Defendants

NOTICE OF MOTION

To: To All Counsel in the Above-Captioned Case

Please take notice that the accompanying Motion To Certify Constitutional Question, Order and Certificate and Memorandum of Points and Authorities will be filed with the United States District Court for the Eastern District of Pennsylvania on May 29, 1974.

(s) Allen W. Hausman
Trial Attorney
U. S. Department of Justice
Civil Division

Dated May 23, 1974

Received
May 29 1974
Litigation Section
Referred ———

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al.

v.

William E. Simon, et al.

MEMORANDUM OPINION AND ORDER

VanArtsdalen, J., November 4, 1974

The Commonwealth of Pennsylvania, together with its Governor, Attorney General and Fuel Allocation Director, seeks equitable relief for alleged improper allocations and pricing of gasoline to Pennsylvania and its residents, primarily during the months of February and March of 1974, under the Emergency Petroleum Allocation Act. Pub. L. No. 93-159 (November 27, 1973). Defendants are the Federal Energy Office (FEO), certain of its officials and various oil companies that do business in Pennsylvania.

Pennsylvania claims standing under four theories (Amended Complaint ¶6):

(1) on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders.

(2) as a user of petroleum products.

(3) as a collector of revenues based on sales of petroleum products within its borders, and

(4) as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the defendants.

Essentially, plaintiff asserts that under the Emergency Petroleum Allocation Act, §4(b)(1)(F), petroleum products are to be allocated equitably both as to quantity and price among all regions and areas of the country, and that in March, 1974 Pennsylvania received less than its proper share of gasoline from the oil company defendants. Additionally, it is asserted that §4(b)(1)(F) requires equitable prices, and the prices charged in Pennsylvania were higher than in other states; that FEO officials used an incorrect allocation formula for Pennsylvania; that the oil companies had hidden excess inventories; and that the oil companies were not required by the FEO to comply with the regulations adopted by FEO concerning reporting of inventories.

Various defendants assert in motions to dismiss that plaintiffs lack standing. The federal defendants have moved to certify the issue of standing to the Temporary Emergency Court of Appeals (TECA) as a substantial constitutional issue under §211(c) of the Economic Stabilization Act, 12 U.S.C.A. §1904 (Supp. 1974), as incorporated by §5(a)(1) of the Emergency Petroleum Allocation Act.

The sole issue to be decided is whether a substantial constitutional issue exists requiring certification to the TECA under §211. I have concluded that such an issue does exist.

I. *Certification of a Constitutional Issue*

The certification of a constitutional issue to the TECA is mandated by §211(c) of the Economic Stabilization Act, 12 U.S.C.A. §1904 (1974 Supp.), as incorporated by §5 of the Emergency Petroleum Allocation Act. The TECA is created in §211(b) with powers of a circuit court of appeals but with exclusive jurisdiction of appeals from the district courts in cases and controversies arising under the Economic Stabilization Act (and now the Emergency Petroleum Allocation Act). The certification procedure is in §211(c).

> In any action commenced under this title in any district court of the United States in which the *court determines that a substantial constitutional issue exists,* the court *shall certify* such issue to the Temporary Emergency Court of Appeals. [Emphasis added.]

The meaning of this language is inescapable; if a district court finds that a substantial constitutional issue exists, then it must certify that issue to the TECA. Thus the district court's sole initial obligation is to determine if there is a substantial constitutional issue. Once found, that issue must be certified to the TECA. *National Petroleum Refiners Association v. Dunlop,* 486 F. 2d 1388 (T.E.C.A. 1973).

Does the standing of plaintiffs to maintain this action constitute a substantial constitutional issue? Plaintiff contends that a reading of the entire act supports its position that only a substantial question as to the constitutionality of the act itself was intended to be required to be certified to TECA.

§211(a) places exclusive original jurisdiction of cases or controversies arising under the act in the federal district courts. This section further provides that in any proceeding before any court if

> an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States. . . .

Thus, §211(a) insures that a "deathknell" determination of the constitutionality of the Act is not dealt by a state court. The constitutionality of the Act and the validity of federal agency action are issues to be determined in a federal forum. Plaintiff, however, contends that by interphasing §§211(a) and (c) the meaning of "substantial constitutional issue" in §211(c) is solely an issue which questions the constitutionality of the Act itself. This is too restrictive an interpretation of §211(c).

The clear language of the two sections requires the rejection of the narrow interpretation of §211(c) favored by plaintiff. §211(c) applies to actions "commenced . . . in any district court of the United States." That section establishes the test for certification as "a substantial constitutional issue." On the other hand, §211(a) is for removal of actions brought in a state court to a federal court. The test to be used for removal is the constitutionality of the act and/or the validity of the agency action when either is posed as a defense. Thus §211(c) concerns (1) actions commenced in federal district court; (2) to be certified to TECA; (3) the test being a substantial constitutional issue. This is to be contrasted with §211(a)

dealing with (1) actions commenced in state court; (2) subject to removal to federal court; (3) the test being a defense of constitutionality of the act or validity of agency action.

Clearly then, §211(c) requires only that a substantial constitutional issue exists. If Congress had intended that §211(c) include only the constitutionality of the act, it could have utilized language similar to that in §211(a).

The TECA, in cases certified to it for substantial constitutional issues, has not advanced the narrow interpretation. In *Schirtzinger v. Dunlop*, 489 F.2d 1307 (TECA 1973), the TECA dealt only with the challenge of the constitutionality of subpart L of the Cost of Living Council Phase IV Regulations. As plaintiff pointed out during oral argument, *Schirtzinger* dealt with a challenge to the constitutionality of the Act. The per curiam decision did not discuss what is meant by a "substantial constitutional issue." It would be dangerous and logically incorrect to infer that because the issue before the *Schirtzinger* court was a challenge to the constitutionality of the Act and its regulations, §211(c) is available only for such constitutional issues. In *National Petroleum Refiners, supra,* TECA was faced with a certification of a constitutional issue which did not challenge the Act. It was held that the certification was improper because the entire case, and not merely the constitutional issues, was certified and further that the constitutional issues were peripheral to the case. Thus neither *Schirtzinger* nor *National Petroleum* are dispositive of the question before me. The language of the Act is clear. It refers to "a substantial constitutional issue." If standing is a substantial constitutional issue, it must be certified to the TECA.

II. *Standing as a Substantial Constitutional Issue*

Standing may present a constitutional issue under Article III, §2. *Flast v. Cohen*, 392 U.S. 83, 101 (1968); *Massachusetts v. Mellon*, 262 U.S. 447 (1923). It is difficult to define standing because it is an amorphous concept which often is used as a shorthand expression for the broader concept of justiciability. *Flast v. Cohen, supra* at 99. Reduced to its essence standing is the requirement that a particular plaintiff have a personal stake in the outcome of the litigation. *Baker v. Carr*, 369 U.S. 186, 204 (1962).

In *Massachusetts v. Mellon, supra,* the Commonwealth of Massachusetts brought an action as *parens patriae* while in the related case of *Frothingham v. Mellon* a taxpayer's suit challenged the constitutionality of the Maternity Act of 1921. 42 Stat. 224. The Supreme Court held that the plaintiffs in both actions lacked standing.

In so doing it brought standing to a constitutional dimension based upon the "case or controversy" requirement of Article III. *Frothingham-Massachusetts, supra* at 480. In addition to articulating that the Constitution required that a justiciable controversy exist, the Court in *Massachusetts* went on to say at page 485:

> While the state, under some circumstances, may sue in that capacity for the protection of its citizens, it is no part of its duty or power to enforce their right in respect of their relations with the Federal Government. In that field it is the United States, not the State, which represents them as *parens patriae* when such representation becomes appropriate. . . . [citation omitted.]

Frothingham-Massachusetts erected a constitutional barrier of standing. Because of imprecision in the concept of standing, policy considerations have often blended into the constitutional requirements of standing causing confusion. *Flast v. Cohen, supra* at 99.

The federal courts, except in cases involving *parens patriae* actions by states against the federal government, have refashioned standing requirements by emphasizing that standing has two aspects—Constitutional and Policy, thus simplifying the constitutional requirement. The constitutional requirement of standing is based upon the case or controversy requirement of Article III and is predicated upon the plaintiff himself asserting an injury to a cognizable interest capable of judicial resolution. *Schlesinger v. Reservists Committee To Stop the War,* —— U.S. , 42 U.S.L.W. 5088, 5091 (1974); *United States v. Richardson,* U.S. , 42 U.S.L.W. 5076, 5080 (1974); *O'Shea v. Littleton,* 414 U.S. 488, 493-94 (1974); *Sierra Club v. Morton,* 405 U.S. 727, 734-35 (1972); *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 150-54 (1970); *Flast v. Cohen, supra* at 101; *Baker v. Carr, supra* at 204. While these cases have resulted in an erosion of the strict constitutional standing requirements of *Frothingham* in favor of non-constitutional judicial self restraint, there has not been a formal relaxation or affirmative redefinition of the role of *Massachusetts.* In the instant case we are faced squarely with a situation in which the role of *Massachusetts v. Mellon* is crucial since Pennsylvania sues as *parens patriae* against the federal government. Because it is difficult to distinguish the constitutional aspects of standing from the policy aspects, it is not altogether clear whether the pronouncement in *Massachusetts* that a state did not have standing to sue the federal government as *parens patriae* was solely constitutional, solely policy or a blend of both. The recent Supreme Court cases dealing with standing do not affect *Massachusetts* directly.

My inquiry is not whether *Massachusetts* has any vitality in light of the Supreme Court standing cases which began with *Baker v. Carr.* Under §211 of the Economic Stabilization Act, my inquiry is whether a substantial constitutional issue exists. It is not an inquiry into whether the constitutional claim is meritorious. Here a substantial constitutional issue exists. On the one hand a substantial body of law questions or at least challenges *Massachusetts v. Mellon.* See *Flast v. Cohen, supra; Data Processing, supra;* and *Sierra Club, supra.* On the other hand the federal courts have not directly articulated what the constitutional standing requirements are when a state invokes *parens patriae* to challenge the federal government. Indeed, another substantial body of law has upheld *Massachusetts v. Mellon. South Carolina v. Katzenbach,* 383 U.S. 301 (1966); *Florida v. Mellon,* 273 U.S. 12 (1927); *Massachusetts v. Laird,* 451 F.2d 26 (1st Cir. 1971); *Public Utilities Commission of California v. United States,* 356 F.2d 236 (9th Cir. 1966), *cert. denied,* 385 U.S. 816 (1966); *Minnesota v. Benson,* 274 F.2d 764 (D.C. Cir. 1960). That a constitutional issue exists is manifest. As Mr. Justice Douglas said on this very issue:

> "The erosion of *Frothingham* does not, of course, necessarily mean that the authority of [*Massachusetts v.*] *Mellon* has been affected. But if the current debate over *Frothingham* 'suggests that we should undertake a fresh examination of the limitations upon

> standing to sue,' [*Flast v. Cohen,*] 392 U.S., at 94, then surely the erosion of *Frothingham* suggests it is time to re-examine its companion case."

Massachusetts v. Laird, 400 U.S. 886, 889 (1970) (Douglas, J. dissenting).

While the foregoing has dealt only with plaintiff's claim as *parens patriae*, three other theories of standing are posed. Plaintiff's assertion that it has a responsibility for the health, safety and welfare of its citizens would seem to be closely allied with a *parens patriae* theory. Certainly it is the persons who live in Pennsylvania who are injured, not the state itself. This is traditionally brought within the purview of *parens patriae. Gibbs v. Titelman,* 369 F. Supp. 38, 54 (E.D. Pa. 1973), *rev'd on other grounds,* F.2d (3d Cir. 1974), slip opinion 74-1062, August 1, 1974. As *Sierra Club* held, the plaintiff "be himself among the injured." *supra* at 734. If the state sues on behalf of itself when its citizens are injured, it fails to meet the injury in fact test of Article III.[1]

A state seeking review in federal court as a collector of revenues has been denied standing. *Florida v. Mellon, supra* at 18. The alleged injury is too indirect, remote and speculative. As a user, plaintiff has seemingly failed to conform to the very administrative regulations which it

[1]This issue has been particularly troublesome in private antitrust cases where the state is plaintiff, under §4 Clayton Act. 15 U.S.C. §15. Courts have held that the state lacks the requisite injury. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); *In Re Multidistrict Vehicle Air Pollution*, 481 F. 2d 122 (9th Cir. 1973), *cert. denied sub nom. Morgan v. Automobile Manufacturers Association, Inc.*, 414 U.S. 1045; *Illinois v. Associated Milk Producers, Inc.*, 351 F. Supp. 436 (N.D. Ill. 1972).

seeks to enforce. 10 C.F.R. §§205.43 and Subpart H §205.141 *et seq.*

While the constitutional issues of the instant case may be complex, there is one uncomplicated aspect—there is a substantial issue as to standing.[2] Thus, under the clear direction of §211 of the Economic Stabilization Act as incorporated by §5 of the Emergency Allocation Act, this issue must be certified to the Temporary Emergency Court of Appeals.

[2] Mootness may be yet another factor leading to the conclusion that a substantial constitutional issue exists. Mootness is a function of the Article III case or controversy requirement. *North Carolina v. Rice,* 404 U.S. 244, 246 (1971). It is not clear, nor has it been formally argued, that the instant case is moot. Nevertheless the March 1974 allocation has long since passed. However, it must be noted that a situation does not become moot merely because the conduct complained of has terminated if there is a possibility of re-occurrence. *Dunn v. Blumstein,* 405 U.S. 330, 333 n. 2 (1972); *SEC v. Medical Committee for Human Rights,* 404 U.S. 403 (1972); *NLRB v. Raytheon Co.*, 398 U.S. 25, 28 (1970); *Carroll v. President and Commissioners of Princess Anne,* 393 U.S. 175, 178 (1968).

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al.

v.

William E. Simon, et al.

ORDER

And now, this 4th day of November, 1974, the court finds and determines a substantial constitutional issue exists as to the standing of the Commonwealth of Pennsylvania and its officials to maintain an equitable action against the Federal Energy Office and its officials and various oil companies for improper allocations and pricing of gasoline in Pennsylvania under the Emergency Petroleum Allocation Act; the said issue is hereby certified to the Temporary Emergency Court of Appeals for determination.

By the Court,
(s) Donald W. VanArtsdalen
J.

IN THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

No.: C.A. 74-672

In Re: Shapp et al.

v.

Simon et al.

Date: 11-5-74

This is to advise you that Judge Donald W. VanArtsdalen filed a Memorandum opinion and order, VanArtsdalen, J., wherein it is ordered that the Court having found and determined that a substantial Constitutional issue exists as to the standing of Pennsylvania and its officials to maintain an equitable action against the F.E.O. *et al.* for improper allocations and pricing of gasoline in Pa. that said issue is Certified to the Temporary Emergency Ct. Appeals, filed.

The clerk's fee is $2.50 for said Opinion, Memorandum and/or Order.

John J. Harding, Esq.
Clerk
By (s) William F. Ward
Deputy Clerk

Notice to: All Counsel [27]

Milton J. Shapp et al.,
Plaintiffs-Appellants,

v.

William E. Simon et al.,
Defendants-Appellees.

No. 3-4

Temporary Emergency Court of Appeals

Jan. 13, 1975
[510 F.2d 379 (1975)]

Action was instituted wherein it was alleged that wrongful conduct of Federal Energy Office and various oil companies had resulted in improper diminution of allocation of gasoline which Federal Energy Office made available to state and other users. The United States District Court for the Eastern District of Pennsylvania, Donald W. VanArtsdalen, J., sustained Federal Energy Administrator's motion and certified to Temporary Emergency Court of Appeals the question of plaintiffs' standing. Thereafter, Administrator filed a suggestion that Temporary Emergency Court of Appeals had entire action sent to it for consideration and final determination. The Temporary Emergency Court of Appeals held that question whether any of

plaintiffs was a "person suffering legal wrong" and thus had standing to institute action complaining of improper diminution of allocation of gasoline to state by Federal Energy Office under emergency Petroleum Allocation Act of 1973 was essentially a question of interpretation and application of statute and was not a "substantial constitutional question" within statute authorizing certification of such questions to Temporary Emergency Court of Appeals.

Case remanded to district court with directions.

War and National Emergency

Question whether any of plaintiffs was a "person suffering legal wrong" and thus had standing to institute action complaining of improper diminution of allocation of gasoline to state by Federal Energy Office under Emergency Petroleum Allocation Act of 1973 was essentially a question of interpretation and application of statute and was not a "substantial constitutional question" within statute authorizing certification of such questions to Temporary Emergency Court of Appeals. Emergency Petroleum Allocation Act of 1973, §§1 et seq., 5, 15 U.S.C.A. §§751 et seq., 754; Economic Stabilization Act of 1970, §§210 (a), 211 (c) as amended 12 U.S.C.A. §1004 note.

See publication Words and Phrases for other judicial constructions and definitions.

Lawrence Silver, Deputy Atty. Gen., Dept. of Justice, and James R. Adams, Harrisburg, Pa., Com. of Pa., on the brief for plaintiffs-appellants.

Allen W. Hausman, Washington D. C., Carla A. Hills, Asst. Atty. Gen., New York City, Stanley Rose and Christopher Was, Dept. of Justice, Washington, D. C., with him on the brief for defendants-appellees government.

William Simon and Keith E. Pugh, Jr., Washington, D. C., on the brief for defendant-appellee Shell Oil Co.

Edmund K. Trent and James J. Restivo, Jr., Pittsburgh, Pa., on the joint brief for plaintiffs-appellees Pennzoil Co. and United Refining Co., adopting by reference the brief of defendant-appellee Shell Oil Co.

John C. Detweiler, Valley Forge, Pa., on the brief for defendant-appellee Mobil Oil Corp.

Alfred W. Cortese, Jr., Philadelphia, Pa., for appellee Amoco Oil Co.; Richard G. Schneider, Philadelphia, Pa., and C. Lansing Hays, Jr., New York City, for appellee Getty Oil Co. (Eastern Operations); John G. Harkins, Jr., and Barbara W. Mather, Philadelphia, Pa., for appellees Continental Oil Co. and Crown Central Petroleum Corp.; David F. Albright and Richard M. Kremen, Baltimore, Md., for appellee Petroleum Marketing Corp., adopting by reference the brief of Shell Oil Co.

Before Hastie, Christensen and Johnson, Judges.

ON SUGGESTION FOR REMOVAL FROM THE DISTRICT COURT

Per Curiam:

The posture of this case is unusual in that its removal to the Temporary Emergency Court of Appeals for trial and adjudication of all issues is proposed before any part of the controversy has been decided by the district court in which suit was properly brought.

In the district court, the Commonwealth of Pennsylvania and the Governor and other high officers of that state sued the Federal Energy Administrator and several

corporations that sell gasoline in Pennsylvania. The complaint alleged that wrongful conduct of the Federal Energy Office and various oil companies had resulted in improper diminution of the allocations of gasoline which the Federal Energy Office made available to the Commonwealth and other users of gasoline in Pennsylvania under the Emergency Petroleum Allocation Act of 1973.

On March 11, 1974, the Federal Energy Administrator responded by moving for dismissal of the complaint for lack of standing, mootness, failure to state a claim entitling the plaintiffs to relief and, alternatively, for summary judgment. Then, before the district court acted on his motion, the Administrator moved that the district court certify to this court, as a "substantial constitutional issue", the question he had raised whether the plaintiffs have standing to litigate the claims that constitute their complaint. Section 211(c) of the Economic Stabilization Amendment of 1971, as made applicable to petroleum allocation cases by Section 5 of the Emergency Petroleum Allocation Act of 1973, was invoked as the statutory sanction for such certification. The district court granted this motion and certified to us the question of the plaintiffs' standing.

Promptly thereafter, the Administrator, invoking our power and discretion under Section 211(c) of Economic Stabilization Amendments of 1971, filed a suggestion "that this Court have the entire action sent to it for consideration and final determination". Thus, moving in two steps, the Administrator is seeking to have this entire law suit tried and decided in first instance by the Temporary Emergency Court of Appeals. We cannot properly consider the suggested second step before determining whether the first step of certifying the standing issue to us was appropriate.

The question whether the plaintiffs have standing to litigate the claims they have asserted arises under the provision of Section 210(a) of the 1971 Act that "any person suffering legal wrong because of this title" may bring an action in the district court. Thus, the district court was confronted with the question whether any of the plaintiffs is a "person suffering legal wrong" through the acts alleged in the complaint. This, in our view, is essentially a question of the interpretation of a statute and the applicability of its language to persons who are affected, in the ways that plaintiffs say they are, by the conduct complained of. We do not understand it to be contended that Congress could not constitutionally authorize the Commonwealth of Pennsylvania or its Chief Executive to bring such a suit as this. Rather, the question is whether such authority is conferred by Section 210(a). We hold that this is not a "substantial constitutional question" within the meaning of Section 211(c).[1]

This case has come to this court pursuant to an inappropriate certification by the district court. The case is hereby remanded to the district court with direction to determine the merits of the March 11, 1974 motion to dismiss and, more generally, to proceed with this litigation as may be appropriate for the adjudication of the controversy.

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[1] Cf. *Gonzalez v. Automatic Employees Credit Union*, 1974, 419 U.S. 90, 95 S. Ct. 289, 42 L. Ed. 2d 249, where, under a different statutory scheme, a decision by a three-judge district court, dismissing for lack of standing a plaintiff's challenge to the constitutionality of a state statute, was held not to present "a substantial constitutional question" directly reviewable by the Supreme Court.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton J. Shapp, et al.

v.

William E. Simon, et al.

MEMORANDUM OPINION AND ORDER

VanArtsdalen, J., April 24, 1975.

The Commonwealth of Pennsylvania, together with its Governor, Attorney General and Fuel Allocation Director, seeks equitable relief for alleged improper allocations and pricing of gasoline to Pennsylvania and its residents, primarily during the months of February and March of 1974, under the Emergency Petroleum Allocation Act of 1973 (EPA), 15 U.S.C.A. §751, *et seq.* (Supp. 1975). Defendants are the Federal Energy Office (FEO),[1] certain of its officials and various oil companies.

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[1] The Federal Energy Administration was created by the Federal Energy Administration Act of 1974, May 7, 1974, Pub. L. 93-275, 15 U.S.C.A. §761(c) (Supp. 1975). By Executive Order 117900, §3(b), June 25, 1974, 15 U.S.C.A. Supp. 1975, p. 215, the President transferred the authority of the Federal Energy Office (FEO) to the Federal Energy Administration (FEA).

Plaintiff claims standing under four theories (Complaint ¶6):

> (1) on behalf of itself, as it has responsibility for the health, safety and welfare of persons within its borders;
>
> (2) as a user of gasoline;
>
> (3) as a collector of revenues based on sales of petroleum products within its borders; and
>
> (4) as *parens patriae* on behalf of persons within its borders who have been and will be harmed by the wrongful acts of the defendants.

The complaint alleges that under §4(b)(1)(F) of the EPA, 15 U.S.C.A. §753(b)(1)(F),[2] petroleum products are to be allocated equitably as to quantity and price among all regions and areas of the country; that Pennsylvania received less than its proper share of gasoline from the oil company defendants and that the prices charged to Pennsylvania were inequitably higher than in other states. Additionally, it is asserted that the FEO used an incorrect allocation formula for Pennsylvania; and that the oil companies had hidden excess inventories; that the oil companies did not comply with FEO regulations concerning reporting of inventories; and that the FEO, in violation of their own regulations, did not require the oil companies to comply with the reporting requirements.

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[2] (b)(1) The regulations under subsection (a) of this section to the maximum extent practicable shall provide for—

> (F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers and among all users;

This action was filed on March 20, 1974 and was assigned to a judge of this court, who subsequently recused himself. The case was reassigned by random selection on June 11, 1974 and, on September 5, 1974, a conference and hearing was held. On November 4, 1974 this court certified to the Temporary Emergency Court of Appeals (TECA) under §5(a)(1) of the EPA, 15 U.S.C.A. §754(a)(1) and §211(c) of the Economic Stabilization Act of 1970, 12 U.S.C.A. §1904 (Supp. 1975, Notes §211(c)), that a substantial constitutional issue existed as to whether plaintiff had standing to maintain the action. On January 13, 1975 the TECA held that the issue was "not a substantial constitutional question within the meaning of section 211(c)." *Shapp v. Simon*, 510 F.2d 379, 381 (TECA 1975). In accordance with the remand order of the TECA, disposal of the outstanding motions to dismiss is required. The motions to dismiss are based upon a variety of theories including lack of subject matter and personal jurisdiction, venue, failure to state a claim, failure to join indispensable parties, standing, mootness and failure to exhaust administrative remedies.

In actuality the claim is against the FEO and not the oil companies. In the original complaint only count three of the six-count complaint dealt with the oil companies. The gravamen of count three is:

> 36. Upon information, knowledge and belief, the figures supplied by the oil company defendants to FEO Defendants and the figures released by FEO Defendants are misleading and inaccurate.

Under the regulations then in effect the oil companies were required to submit various reports to the FEO only. 10 C.F.R. §§211.66; 211.86; 211.96; 211.106; 211.126;

211.146; 211.166 and 211.187. These reports were to be the basis for the allocation of petroleum products by FEO. One report was to be submitted monthly to both FEO and the states, 10 C.F.R. §211.222. This was to be the basis of the state set-aside volume.[3] Clearly, if the oil companies are not in compliance with these regulations because they submitted inaccurate and misleading information or did not submit reports at all, then it is the FEO and not an individual state which must enforce the regulations. The FEO specifically has the power to enforce the regulations. 10 C.F.R. §§ 205 Subpart E, and 210 Subpart F. This most assuredly applies to the reports submitted only to FEO for the allocation of petroleum products. As to the monthly report, a copy of which the state receives, it follows that the state must also seek redress within the agency process and not sue an oil company in federal court. This is bolstered by the fact that the FEO and not the state determines both the amounts to be set aside and to be allocated. Thus, it is clear that what the plaintiff has brought is in reality an action for mandamus[4] against FEO. There is no justification for the oil companies to remain as defendants in this lawsuit. On the contrary, reasons for their dismissal abound. First, the proper defendant is the FEO and not the oil companies.

[3] The state set-aside program was established in the Regulations. 10 CFR §211.17. The FEO determined from reports filed by the oil companies a percentage of the allocable product sold in the state. This amount of fuel is "set aside" to be used by the state office to meet energy hardships.

[4] The original complaint did not include 28 U.S.C.A. §1361 (1962) (Sup. 1975), as a basis of jurisdiction. The proposed amended complaint—filed after the motions to dismiss had been served upon plaintiff—does include that statute.

Second, while the oil companies could conceivably be termed nominal defendants for the purpose of facilitating a decree against them, such logic is hardly persuasive.[5] This is especially true since it is FEO which is responsible to enforce its regulations against the oil companies. Third, by its express language, the statutory breadth of 28 U.S.C.A. §1361 (1962) (Supp. 1975) is "to compel an officer or employee of the United States or any agency." Fourth, because the suit will be dismissed as to the federal defendants, there is utterly no rationale to keep the oil companies in this action.

It is now necessary to determine whether plaintiff has standing to bring this action. According to the TECA, this is wholly a question of statutory interpretation of §5(a)(1) of the EPA, and §210(a) of the Economic Stabilization Act.

> The question whether the plaintiffs have standing to litigate the claims they have asserted arises under the provision of Section 210(c) [sic] of the 1971 Act that "any person suffering legal wrong because of this title" may bring an action in the district

[5] Because the relief sought can be granted only to FEA, the remedy is made without regard to the placement of the oil companies in this action. Under Section 1361 any decree would be against the FEA which would have been directed to enforce its regulations. Thus, the oil companies are not necessary in such an action. *Cf., W. B. Fishburn Cleaners, Inc. v. Army and Air Force Exchange Service*, 374 F. Supp. 162, 167 (N.D. Tex. 1974); *Gager and Goldberg, Inc. v. United States*, 44 FRD 477, 479 (D. Conn. 1968). This case differs from a situation wherein the federal officer sued under §1361 cannot enforce the necessary relief and another party who can supply the relief is necessary. *Marquez v. Hardin*, 339 F. Supp. 1364, 1371 (N.D. Cal. 1969).

> court. Thus, the district court was confronted with the question whether any of the plaintiffs is a "person suffering legal wrong" through the acts alleged in the complaint. This, in our view, is essentially a question of the interpretation of a statute and the applicability of its language to persons who are affected, in the ways that plaintiffs say they are, by the conduct complained of. We do not understand it to be contended that Congress could not constitutionally authorize the Commonwealth of Pennsylvania of its Chief Executive to bring such a suit as this. Rather the question is whether such authority is conferred by Section 210(a).

Shapp v. Simon, 510 F.2d at 380-81.

The issue then is whether a *parens patriae* action may be brought by a state against the FEO and its officials under §210(c) of the Economic Stabilization Act of 1970 as incorporated by §5(a)(1) of the EPA.[6] I previously ruled that the *parens patriae* theory of standing was the only viable theory for plaintiff.[7] This ruling was not altered by the TECA decision.

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[6] Section 5(a)(1) of the Emergency Petroleum Act of 1973, 15 U.S.C.A. §754(a)(1) (Supp. 1975), incorporates, *inter alia*, §210 of the Economic Stabilization Act of 1970, 12 U.S.C.A. §1904 (Supp. 1975, Notes).

> §210. Suits for damages or other relief.
>
> (a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States. . . .

[7] Plaintiff's assertion that it has a responsibility for the health, safety and welfare of its citizens would seem to be closely allied with a *parens patriae* theory. Certainly, it is the persons who live in Pennsylvania who are injured, not the state itself. This is traditionally brought within the purview of *parens patriae*. *Gibbs v. Titleman*, 369 F. Supp. 38, 54 (E.D. Pa. 1973), *rev'd. on other grounds* [502 F. 2d 1107] (3d Cir. 1974). . . . As Sierra Club held, the plaintiff "be himself among the injured." *supra*, at 734, if the state sues on behalf of itself when its citizens are injured, it fails to meet the injury in fact test of Article III.

A state seeking review in federal court as a collector of revenues has been denied standing. *Florida v. Mellon, supra* at 18. The alleged injury is too indirect, remote and speculative. As a user, plaintiff has seemingly failed to conform to the very administrative regulations which it seeks to enforce. 10 CFR §§205.43 and subpart II 205.141 *et seq.*

Shapp v. Simon, supra, slip opinion at 8 (E.D. Pa. Nov. 4, 1974).

It is clear that plaintiffs lack standing for two reasons. First is the barrier established in *Massachusetts v. Mellon*, 262 U.S. 447 (1923), that a state, as *parens patriae*, may not sue the federal government. While this premise has been questioned, *Massachusetts v. Laird*, 400 U.S. 886, 889 (1970) (Douglas, J. dissenting), its vitality has been repeatedly upheld. *South Carolina v. Katzenbach*, 383 U.S. 301 (1966); *Florida v. Mellon*, 273 U.S. 12 (1927); *Massachusetts v. Laird*, 451 F.2d 26 (1st Cir. 1971); *Public Utilities Commission of California v. United States*, 356 F.2d 236 (9th Cir.), *cert. denied* 385 U.S. 816 (1966). Moreover, Congress has not specifically provided for *parens patriae* actions in §210, but instead has established other procedures.

The second barrier is that established by the Supreme Court when federal agency action is challenged and standing is predicated upon statutory authorization. The Court has established a two-pronged test: The plaintiff must

show that the challenged action has caused it "injury in fact", and the alleged injury is an interest "arguably within the zone of interests to be regulated" by the statutes alleged to have been violated. *United States v. Scrap,* 412 U.S. 669, 686 (1973); *Sierra Club v. Morton,* 405 U.S. 727, 733 (1970); and *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 150-154 (1970). It was stressed in *Scrap, supra* at 687 and *Sierra Club, supra* at 735, that "the party seeking review be himself among the injured." Thus, the plaintiff must demonstrate a specific injury. Plaintiff in the instant action cannot satisfy the injury in fact test and consequently lacks standing. The harm is to the citizens and not to the state. As Judge Fisher pointed out in a similar case, Byrne v. Simon, Civil Action 74-372, Slip Opinion p. 5 (D. N.J. March 19, 1975) (unpublished), "the principal claim of harm is not to the State . . . but to its citizens and retail gasoline dealers." Thus a showing of particularized harm by the plaintiff is lacking.

Even assuming *arguendo* that plaintiff could meet the injury in fact test, this case would not be ripe for adjudication.[8] Section 207 of the Economic Stabilization Act, requires that regulations be promulgated concerning the review of agency action. The regulations specifically established administrative remedies and appeals. 10 CFR §205.43 and Subpart H 205.141 *et seq.* There is no allegation that plaintiff has complied with these regulations and exhausted the administrative remedies. Therefore, because administrative remedies have not been exhaust-

[8] *Davis, Administrative Law Treatise,* §20.01 (1958) and (1970 Supp.).

ed, the instant case is not properly before the court. *American Nursing Home Ass'n. v. Cost of Living Council,* 497 F.2d 909, 913 (TECA 1974); *Consumers Union of United States, Inc. v. Cost of Living Council,* 491 F.2d 1396, 1399-1400 (TECA), *cert. denied* —— U.S. ——, 94 S. Ct. 2387 (1974); *Anderson v. Dunlop,* 485 F.2d 666, 668-670 (TECA 1973), *cert. denied* 414 U.S. 1131 (1974); *City of New York v. New York Telephone Co.,* 468 F.2d 1401, 1403 (TECA 1972). The exhaustion requirement is premised upon the special competence of agencies in which Congress has reposed the duty to perform a specialized function. Deference to the administrative process allows the agency to develop facts and apply the law to a problem in which it has an acknowledged expertise that a court may lack. Moreover, duplication is avoided since the agency's ultimate decision, after the administrative remedies are exhausted, may obviate the need for judicial intervention. *Schlesinger v. Councilman,* —— U.S. —— (1975), 43 U.S.L.W. 4432, 4438 (March 25, 1975). In the instant case, it is quite likely that if the FEO procedures as set forth in the regulations had run their natural course, court action would have been obviated. Moreover, the law is clear that if mandamus is sought under 28 U.S.C.A. §1361, as in the present action, all other available means of relief must be exhausted. *Richardson v. United States,* 465 F.2d 844, 849 (3d Cir. 1970), *rev'd on other grounds,* 418 U.S. 166, 41 L. Ed. 2d 678 (1974).

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Judgment Entered
Date Sep 18 1975

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David F. Albright and Richard M. Kremen, Semmes, Bowen & Semmes, Attorneys, Baltimore, Maryland for Appellee-Petroleum Marketing Corporation.

Appeal From the United States District Court for the Eastern District of Pennsylvania

(No. 74-672)

Before: Tamm, Chief Judge, Hastie and Johnson, Judges.

Per Curiam:

The State and the Governor of Pennsylvania brought this suit to challenge the Federal Energy Administration's allocation of motor gasoline among the states and certain related administrative procedures. The challenged actions had been taken under the Emergency Petroleum Allocation Act. This controvrsy has now been rendered moot by the expiration of statutory authority for the entire program of federal control and allocation of petroleum products.

The district court dismissed the complaint on the ground that the plaintiff lacked standing. However, on this appeal from that decision, supervening mootness prevents us from reviewing the issue of standing.

The order dismissing the complaint for lack of standing is vacated, and the cause is remanded to the district court with direction to enter a new order of dismissal because the controversy has become moot.

TEMPORARY EMERGENCY COURT OF APPEALS
OF THE UNITED STATES

Before Honorable Edward Allen Tamm, Chief Judge, Honorable William H. Hastie and Honorable Frank M. Johnson, Jr., Judges.

No. 3-8

Milton J. Shapp et al.,
Plaintiffs-Appellants

v.

William E. Simon et al.,
Defendants-Appellees

This cause from the United States District Court for the Eastern District of Pennsylvania was submitted to the court on Appellees-Government's Motion To Dismiss the appeal and the following action is ordered:

The district court order dismissing the complaint for lack of standing is vacated, and the cause is remanded to that court with direction to enter a new order of dismissal because the controversy has become moot.

For the Court:
(s) Ruth H. Jacobson
Clerk

September 17, 1975

A TRUE COPY
Ruth H. Jacobson
[Illegible]
Clerk

By: Donna N. Bold
Deputy Clerk

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Before Honorable Edward Allen Tamm, Chief Judge, Honorable William H. Hastie and Honorable Frank M. Johnson, Jr., Judges.

No. 3-8

Milton J. Shapp et al.,
Plaintiffs-Appellants

v.

William E. Simon et al.,
Defendants-Appellees

Upon consideration of Appellants' Petition for Reconsideration and Rehearing,

IT IS ORDERED that said petition is DENIED. Judge Johnson dissents.

For the Court:
(s) Ruth H. Jacobson
Clerk

October 30, 1975

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

* * * * * * * *

TITLE 15.—COMMERCE AND TRADE

§751 Page 736

Sec.

753. Mandatory allocation—Continued
(c) Pro rata reductions: President reports to Congress; allocation adjustment; LPG allocation.
(d) Oil produced or refined in the United States.
(e) Crude oil prices at producer level: Presidential report of finding that allocation is not necessary; exemption.
(f) Gasoline allocation: Presidential report to Congress.
(g) Termination of regulations: amendments: exemptions.
754. Administration and enforcement; delegation of authority.
755. Impact on other laws.
(a) Actions under Economic Stabilization Act of 1970.
(b) Preemption of State or local allocation regulations and orders.
(c) Antitrust laws; report to President with respect to creation or maintenance of anticompetitive

trends through regulations; meetings, conferences, and communications involving persons in oil business; defenses to antitrust suits.
756. Monitoring of program by Federal Trade Commission.

Chapter Referred to in Other Sections

This chapter is referred to in sections 766, 793, 796 of this title; title 42 section 1857c-10.

§751. Congressional findings and declaration of purpose.

(a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this chapter is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy. (Pub. L. 93-159, §2, Nov. 27, 1973, 87 Stat. 628.)

Short Title

Section 1 of Pub. L-93-159 provided: "That this Act [enacting this chapter] may be cited as the 'Emergency Petroleum Allocation Act of 1973'."

Defense Department Reduction in Consumption of Petroleum Products; National Security and Essential Training Exercises Exceptions.

Pub. L. 93-155, title VIII, §811, Nov. 16, 1973, 87 Stat. 619, provided that: "The Congress finds that the Department of Defense, which will use, at its present rate of consumption, an estimated twelve billion gallons of petroleum products in 1973, is one of the largest single consumers of petroleum products in the world, and that a reduction in consumption of such products by the Department of Defense would aid materially in meeting the energy shortages which the United States now faces. It is, therefore, declared to be the sense of the Congress that the Department of Defense should implement a 10 per centum reduction of its consumption of petroleum products ex-

cept where such a reduction would adversely affect the national security or essential training exercises."

§752. Definitions.

For purposes of this chapter:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to—

(A) an agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(B) an agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner).

but who is not affiliated with, controlled by, or under common control with any refiner (other than by means of a supply contract, or an agreement or contract described in subparagraph (A) or (B)) and who does not control such refiner.

(2) The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, but who (A) is not a refiner, (B) is not a person who controls, is controlled by, is under common control with,

or is affiliated with a refiner (other than by means of a supply contract), and (C) is not a branded independent marketer.

(3) The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to November 27, 1973; more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

(4) The term "small refiner" means a refiner whose total refinery capacity (including the refinery capacity of any person who controls, is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel.

(6) The term "LPG" means propane and butane, but not ethane.

(7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

(Pub. L. 93-159, §3, Nov. 27, 1973, 87 Stat. 628.)

Section Referred to in Other Sections

This section is referred to in scetion 798 of this title.

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§753. Mandatory allocation.

(a) Authority to promulgate regulations covering crude oil, residual fuel oil, and refined petroleum products.

Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) of this section such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b) Requisite areas of coverage for regulations; price regulations; unobtainability or curtailment of other fuels.

(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally,

show that the challenged action has caused it "injury in fact", and the alleged injury is an interest "arguably within the zone of interests to be regulated" by the statutes alleged to have been violated. *United States v. Scrap,* 412 U.S. 669, 686 (1973); *Sierra Club v. Morton,* 405 U.S. 727, 733 (1970); and *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 150-154 (1970). It was stressed in *Scrap, supra* at 687 and *Sierra Club, supra* at 735, that "the party seeking review be himself among the injured." Thus, the plaintiff must demonstrate a specific injury. Plaintiff in the instant action cannot satisfy the injury in fact test and consequently lacks standing. The harm is to the citizens and not to the state. As Judge Fisher pointed out in a similar case, Byrne v. Simon, Civil Action 74-372, Slip Opinion p. 5 (D. N.J. March 19, 1975) (unpublished), "the principal claim of harm is not to the State . . . but to its citizens and retail gasoline dealers." Thus a showing of particularized harm by the plaintiff is lacking.

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ed, the instant case is not properly before the court. *American Nursing Home Ass'n. v. Cost of Living Council,* 497 F.2d 909, 913 (TECA 1974); *Consumers Union of United States, Inc. v. Cost of Living Council,* 491 F.2d 1396, 1399-1400 (TECA), *cert. denied* —— U.S. ——, 94 S. Ct. 2387 (1974); *Anderson v. Dunlop,* 485 F.2d 666, 668-670 (TECA 1973), *cert. denied* 414 U.S. 1131 (1974); *City of New York v. New York Telephone Co.,* 468 F.2d 1401, 1403 (TECA 1972). The exhaustion requirement is premised upon the special competence of agencies in which Congress has reposed the duty to perform a specialized function. Deference to the administrative process allows the agency to develop facts and apply the law to a problem in which it has an acknowledged expertise that a court may lack. Moreover, duplication is avoided since the agency's ultimate decision, after the administrative remedies are exhausted, may obviate the need for judicial intervention. *Schlesinger v. Councilman,* —— U.S. —— (1975), 43 U.S.L.W. 4432, 4438 (March 25, 1975). In the instant case, it is quite likely that if the FEO procedures as set forth in the regulations had run their natural course, court action would have been obviated. Moreover, the law is clear that if mandamus is sought under 28 U.S.C.A. §1361, as in the present action, all other available means of relief must be exhausted. *Richardson v. United States,* 465 F.2d 844, 849 (3d Cir. 1970), *rev'd on other grounds,* 418 U.S. 166, 41 L. Ed. 2d 678 (1974).

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-672

Milton L. Shapp et al.

v.

William E. Simon et al.

ORDER

And Now, this 27th day of April, 1975, this action is dismissed.

By the Court:

(s) Donald W. VanArtsdalen

J.

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

No. 3-8

Milton J. Shapp et al.,
Plaintiffs-Appellants

v.

William E. Simon et al.,
Defendants-Appellees

Filed

Temporary Emergency Court of Appeals
of the United States

Sep 17 1975

Ruth H. Jacobson

[Clerk]

Lawrence E. Silver, Howard M. Snyder, Deputy Attorneys General, and Robert P. Kane, Attorney General, Commonwealth of Pennsylvania, Harrisburg, Pennsylvania for Appellants.

Rex E. Lee, Assistant Attorney General, Stanley D. Rose, and Allen W. Hausman, Attorneys, Department of Justice, Washington, D.C. for Appellees-Government.

Robert M. Landis, Dechert, Price & Rhoads, Attorneys, Philadelphia, Pennsylvania for Appellee Atlantic Richfield Company.

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Appeal From the United States District Court for the Eastern District of Pennsylvania

(No. 74-672)

Before: Tamm, Chief Judge, Hastie and Johnson, Judges.

Per Curiam:

The State and the Governor of Pennsylvania brought this suit to challenge the Federal Energy Administration's allocation of motor gasoline among the states and certain related administrative procedures. The challenged actions had been taken under the Emergency Petroleum Allocation Act. This controvrsy has now been rendered moot by the expiration of statutory authority for the entire program of federal control and allocation of petroleum products.

The district court dismissed the complaint on the ground that the plaintiff lacked standing. However, on this appeal from that decision, supervening mootness prevents us from reviewing the issue of standing.

The order dismissing the complaint for lack of standing is vacated, and the cause is remanded to the district court with direction to enter a new order of dismissal because the controversy has become moot.

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

Before Honorable Edward Allen Tamm, Chief Judge, Honorable William H. Hastie and Honorable Frank M. Johnson, Jr., Judges.

Opinion and Order Dated September 18, 1975

No. 3-8

Milton J. Shapp et al.,
Plaintiffs-Appellants

v.

William E. Simon et al.,
Defendants-Appellees

This cause from the United States District Court for the Eastern District of Pennsylvania was submitted to the court on Appellees-Government's Motion To Dismiss the appeal and the following action is ordered:

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For the Court:
(s) Ruth H. Jacobson
Clerk

September 17, 1975

A TRUE COPY
Ruth H. Jacobson
[Illegible]
Clerk

By: Donna N. Bold
Deputy Clerk

TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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No. 3-8

Milton J. Shapp et al.,
Plaintiffs-Appellants

v.

William E. Simon et al.,
Defendants-Appellees

Upon consideration of Appellants' Petition for Reconsideration and Rehearing,

IT IS ORDERED that said petition is DENIED. Judge Johnson dissents.

For the Court:
(s) Ruth H. Jacobson
Clerk

October 30, 1975

EMERGENCY PETROLEUM ALLOCATION ACT OF 1973

* * * * * * * *

TITLE 15.—COMMERCE AND TRADE

§751 Page 736

Sec.

753. Mandatory allocation—Continued
(c) Pro rata reductions: President reports to Congress; allocation adjustment; LPG allocation.
(d) Oil produced or refined in the United States.
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trends through regulations; meetings, conferences, and communications involving persons in oil business; defenses to antitrust suits.
756. Monitoring of program by Federal Trade Commission.

Chapter Referred to in Other Sections

This chapter is referred to in sections 766, 793, 796 of this title; title 42 section 1857c-10.

§751. Congressional findings and declaration of purpose.

(a) The Congress hereby determines that—

(1) shortages of crude oil, residual fuel oil and refined petroleum products caused by inadequate domestic production, environmental constraints, and the unavailability of imports sufficient to satisfy domestic demand, now exist or are imminent;

(2) such shortages have created or will create severe economic dislocations and hardships, including loss of jobs, closing of factories and businesses, reduction of crop plantings and harvesting, and curtailment of vital public services, including the transportation of food and other essential goods; and

(3) such hardships and dislocations jeopardize the normal flow of commerce and constitute a national energy crisis which is a threat to the public health, safety, and welfare and can be averted or minimized most efficiently and effectively through prompt action by the Executive branch of Government.

(b) The purpose of this chapter is to grant to the President of the United States and direct him to exercise specific temporary authority to deal with shortages of crude oil, residual fuel oil, and refined petroleum products or dislocations in their national distribution system. The authority granted under this chapter shall be exercised for the purpose of minimizing the adverse impacts of such shortages or dislocations on the American people and the domestic economy. (Pub. L. 93-159, §2, Nov. 27, 1973, 87 Stat. 628.)

Short Title

Section 1 of Pub. L-93-159 provided: "That this Act [enacting this chapter] may be cited as the 'Emergency Petroleum Allocation Act of 1973'."

Defense Department Reduction in Consumption of Petroleum Products; National Security and Essential Training Exercises Exceptions.

Pub. L. 93-155, title VIII, §811, Nov. 16, 1973, 87 Stat. 619, provided that: "The Congress finds that the Department of Defense, which will use, at its present rate of consumption, an estimated twelve billion gallons of petroleum products in 1973, is one of the largest single consumers of petroleum products in the world, and that a reduction in consumption of such products by the Department of Defense would aid materially in meeting the energy shortages which the United States now faces. It is, therefore, declared to be the sense of the Congress that the Department of Defense should implement a 10 per centum reduction of its consumption of petroleum products except where such a reduction would adversely affect the national security or essential training exercises."

§752. Definitions.

For purposes of this chapter:

(1) The term "branded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products pursuant to—

(A) an agreement or contract with a refiner (or a person who controls, is controlled by, or is under common control with such refiner) to use a trademark, trade name, service mark, or other identifying symbol or name owned by such refiner (or any such person), or

(B) an agreement or contract under which any such person engaged in the marketing or distributing of refined petroleum products is granted authority to occupy premises owned, leased, or in any way controlled by a refiner (or person who controls, is controlled by, or is under common control with such refiner).

but who is not affiliated with, controlled by, or under common control with any refiner (other than by means of a supply contract, or an agreement or contract described in subparagraph (A) or (B)) and who does not control such refiner.

(2) The term "nonbranded independent marketer" means a person who is engaged in the marketing or distributing of refined petroleum products, but who (A) is not a refiner, (B) is not a person who controls, is controlled by, is under common control with,

or is affiliated with a refiner (other than by means of a supply contract), and (C) is not a branded independent marketer.

(3) The term "independent refiner" means a refiner who (A) obtained, directly or indirectly, in the calendar quarter which ended immediately prior to November 27, 1973; more than 70 per centum of his refinery input of domestic crude oil (or 70 per centum of his refinery input of domestic and imported crude oil) from producers who do not control, are not controlled by, and are not under common control with, such refiner, and (B) marketed or distributed in such quarter and continues to market or distribute a substantial volume of gasoline refined by him through branded independent marketers or nonbranded independent marketers.

(4) The term "small refiner" means a refiner whose total refinery capacity (including the refinery capacity of any person who controls, is controlled by, or is under common control with such refiner) does not exceed 175,000 barrels per day.

(5) The term "refined petroleum product" means gasoline, kerosene, distillates (including Number 2 fuel oil), LPG, refined lubricating oils, or diesel fuel.

(6) The term "LPG" means propane and butane, but not ethane.

(7) The term "United States" when used in the geographic sense means the States, the District of Columbia, Puerto Rico, and the territories and possessions of the United States.

(Pub. L. 93-159, §3, Nov. 27, 1973, 87 Stat. 628.)

Section Referred to in Other Sections

This section is referred to in scetion 798 of this title.

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§753. Mandatory allocation.

(a) Authority to promulgate regulations covering crude oil, residual fuel oil, and refined petroleum products.

Not later than fifteen days after November 27, 1973, the President shall promulgate a regulation providing for the mandatory allocation of crude oil, residual fuel oil, and each refined petroleum product, in amounts specified in (or determined in a manner prescribed by) and at prices specified in (or determined in a manner prescribed by) such regulation. Subject to subsection (f) of this section, such regulation shall take effect not later than fifteen days after its promulgation. Except as provided in subsection (e) of this section such regulation shall apply to all crude oil, residual fuel oil, and refined petroleum products produced in or imported into the United States.

(b) Requisite areas of coverage for regulations; price regulations; unobtainability or curtailment of other fuels.

(1) The regulation under subsection (a) of this section, to the maximum extent practicable, shall provide for—

(A) protection of public health, safety, and welfare (including maintenance of residential heating, such as individual homes, apartments, and similar occupied dwelling units), and the national defense;

(B) maintenance of all public services (including facilities and services provided by municipally,

cooperatively, or investor owned utilities or by any State or local government or authority, and including transportation facilities and services which serve the public at large);

(C) maintenance of agricultural operations, including farming, ranching, dairy, and fishing activities, and services directly related thereto;

(D) preservation of an economically sound and competitive petroleum industry; including the priority needs to restore and foster competition in the producing, refining, distribution, marketing, and petrochemical sectors of such industry, and to preserve the competitive viability of independent refiners, small refiners, nonbranded independent marketers, and branded independent marketers;

(E) the allocation of suitable types, grades, and quality of crude oil to refineries in the United States to permit such refineries to operate at full capacity;

(F) equitable distribution of crude oil, residual fuel oil, and refined petroleum products at equitable prices among all regions and areas of the United States and sectors of the petroleum industry, including independent refiners, small refiners, nonbranded independent marketers, branded independent marketers, and among all users;

(G) allocation of residual fuel oil and refined petroleum products in such amounts and in such manner as may be necessary for the maintenance of exploration for, and production or extraction of, fuels, and for required transportation related thereto;

(H) economic efficiency; and

(I) minimization of economic distortion, inflexibility, and unnecessary interference with market mechanisms.

(2) In specifying prices (or prescribing the manner for determining them), such regulation shall provide for—

(A) a dollar-for-dollar passthrough of net increases in the cost of crude oil, residual fuel oil, and refined petroleum products to all marketers or distributors at the retail level; and

(B) the use of the same date in the computation of markup, margin, and posted price for all marketers or distributors of crude oil, residual fuel oil and refined petroleum products at all levels of marketing and distribution.

(3) The President in promulgating the regulation under subsection (a) of this section shall give consideration to allocating crude oil, residual fuel oil, and refined petroleum products in a manner which results in making available crude oil, residual fuel oil, or refined petroleum products to any person whose use of fuels other than crude oil, residual fuel oil, and refined petroleum products has been curtailed by, or pursuant to a plan filed in compliance with, a rule or order of a Federal or State agency, or where such person's supply of such other fuels is unobtainable by reason of an abandonment of service permitted or ordered by a Federal or State agency.

(c) Pro rata reductions; Presidential reports to Congress; allocation adjustments; LPG allocation.

(1) To the extent practicable and consistent with the objectives of subsections (b) and (d) of this section, the

mandatory allocation program established under the regulation under subsection (a) of this section shall be so structured as to result in the allocation, during each period during which the regulation applies, of each refined petroleum product to each branded independent marketer, each nonbranded independent marketer, each small refiner and each independent refiner, and of crude oil to each small refiner and each independent refiner, in an amount not less than the amount sold or otherwise supplied to such marketer or refiner during the corresponding period of 1972, adjusted to provide—

(A) in the case of refined petroleum products, a pro rata reduction in the amount allocated to each person engaged in the marketing or distribution of a refined petroleum product if the aggregate amount of such product produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972; and

(B) in the case of crude oil, a pro rata reduction in the amount of crude oil allocated to each refiner if the aggregate amount produced in and imported into the United States is less than the aggregate amount produced and imported in calendar year 1972.

(2) (A) The President shall report to the Congress monthly, beginning not later than January 1, 1974, with respect to any change after calendar year 1972 in—

(i) the aggregate share of nonbranded independent marketers,

(ii) the aggregate share of branded independent marketers, and

(iii) the aggregate share of other persons engaged in the marketing or distributing of refined petroleum products,

of the national market or the regional market in any refined petroleum product (as such regional markets shall be determined by the President).

(B) If allocation of any increase of the amount of any refined petroleum product produced in or imported into the United States in excess of the amount produced or imported in calendar year 1972 contributes to a significant increase in any market share described in clause (i), (ii), or (iii) of subparagraph (A), the President shall by order require an equitable adjustment in allocations of such product under the regulation under subsection (a) of this section.

(3) The President shall, by order, require such adjustments in the allocations of crude oil, residual fuel oil, and refined petroleum products established under the regulation under subsection (a) of this section as may reasonably be necessary (A) to accomplish the objectives of subsection (b) of this section, or (B) to prevent any person from taking any action which would be inconsistent with such objectives.

(4) The President may, by order, require such adjustments in the allocations of refined petroleum products and crude oil established under the regulation under subsection (a) of this section as he determines may reasonably be necessary—

(A) in the case of refined petroleum products (i) to take into consideration market entry by branded independent markets and nonbranded independent

marketers during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of marketing or distribution facilities of such marketers during or subsequent to calendar year 1972, and

(B) in the case of crude oil (i) to take into consideration market entry by independent refiners and small refiners during or subsequent to calendar year 1972, or (ii) to take into consideration expansion or reduction of refining facilities of such refiners during or subsequent to calendar year 1972.

Any adjustments made under this paragraph may be made only upon a finding that, to the maximum extent practicable, the objectives of subsections (b) and (d) of this section are attained.

(5) To the extent practicable and consistent with the objectives of subsections (b) and (d) of this section, the mandatory allocation program established under the regulation under subsection (a) of this section shall not provide for allocation of LPG in a manner which denies LPG to any industrial user if no substitute for LPG is available for use by such industrial user.

(d) Oil produced or refined in the United States.

The regulation under subsection (a) of this section shall require that crude oil, residual fuel oil, and all refined petroleum products which are produced or refined within the United States shall be totally allocated for use by uitimate users within the United States, to the extent practicable and necessary to accomplish the objectives of subsection (b) of this section.

(e) Crude oil prices at producer level; Presidential report of finding that allocation is not necessary; exemption.

(1) The provisions of the regulation under subsection (a) of this section shall specify (or prescribe a manner for determining) prices of crude oil at the producer level, but, upon a finding by the President that to require allocation at the producer level (on a national, regional, or case-by-case basis) is unnecessary to attain the objectives of subsection (b) (1) (E) of this section or the other objectives of subsections (b), (c), and (d) of this section, such regulation need not require allocation of crude oil at such level. Any finding made pursuant to this subsection shall be transmitted to the Congress in the form of a report setting forth the basis for the President's finding that allocation at such level is not necessary to attain the objectives referred to in the preceding sentence.

(2) (A) The regulation promulgated under subsection (a) of this section shall not apply to the first sale of crude oil produced in the United States from any lease whose average daily production of crude oil for the preceding calendar year does not exceed ten barrels per well.

(B) To qualify for the exemption under this paragraph, a lease must be operating at the maximum feasible rate of production and in accord with recognized conservation practices.

(C) Any agency designated by the President under section 754 (b) of this title for such purpose is authorized to conduct inspections to insure compliance with this paragraph and shall promulgate and cause to be published regulations implementing the provisions of this paragraph.

(f) Gasoline allocation; Presidential report to Congress.

(1) The provisions of the regulation under subsection (a) of this section respecting allocation of gasoline need not take effect until thirty days after the promulgation of such regulation, except that the provisions of such regulation respecting price of gasoline shall take effect not later than fifteen days after its promulgation.

(2) If—

(A) an order or regulation under section 203 (a) (3) of the Economic Stabilization Act of 1970 applies to crude oil, residual fuel oil, or a refined petroleum product and has taken effect on or before the fifteenth day after November 27, 1973, and

(B) the President determines that delay in the effective date of provisions of the regulation under subsection (a) of this section relating to such oil or product is in the public interest and is necessary to effectuate the transition from the program under such section 203 (a).

(3) to the mandatory allocation program required under this chapter, he may in the regulation promulgated under subsection (a) of this section delay, until not later than thirty days after the date of the promulgation of the regulation, the effective date of the provisions of such regulation insofar as they relate to such oil or product. At the same time the President promulgates such regulation, he shall report to Congress setting forth his reasons for the action under this paragraph.

(g) Termination of regulations; amendments; exemptions.

(1) The regulation promulgated and made effective under subsection (a) of this section shall remain in effect until midnight August 31, 1975, except that (A) the President or his delegate may amend such regulation so long as such regulation, as amended, meets the requirements of this section, and (B) the President may exempt crude oil, residual fuel oil, or any refined petroleum product from such regulation in accordance with paragraph (2) of this subsection. The authority to promulgate and amend the regulation and to issue any order under this section, and to enforce under section 754 of this title such regulation and any such order, expires at midnight August 31, 1975, but such expiration shall not affect any action or pending proceedings, civil or criminal, not finally determined on such date, nor any action or proceeding based upon any act committed prior to midnight August 31, 1975.

(2) If at any time after November 27, 1973, the President finds that application of the regulation under subsection (a) of this section to crude oil, residual fuel oil, or a refined petroleum product is not necessary to carry out this chapter, that there is no shortage of such oil or product, and that exempting such oil or product from such regulation will not have an adverse impact on the supply of any other oil or refined petroleum products subject to this chapter, he may prescribe an amendment to the regulation under subsection (a) of this section exempting such oil or product from such regulation for a period of not more than ninety days. The President shall submit any such amendment and any such findings to the Congress. An amendment under this paragraph may not exempt more

than one oil product. Such an amendment shall take effect on a date specified in the amendment, but in no case sooner than the close of the earliest period which begins after the submission of such amendment to the Congress and which includes at least five days during which the House was in session and at least five days during which the Senate was in session; except that such amendment shall not take effect if before the expiration of such period either House of Congress approves a resolution of that House stating in substance that such House disapproves such amendment. (Pub. L. 93-159, §4, Nov. 27, 1973, 87 Stat. 629, amended Pub. L. 93-511, Dec. 5, 1974, 88 Stat. 1608.)

References in Text

The Economic Stabilization Act of 1970, referred to in subsec. (1) (2), is Pub. L. 91-379, which is set out as a note under section 1904 of Title 12, Banks and Banking.

Amendments

1974—Subsec. (g) (1), Pub. L. 93-511 substituted "August 31, 1975" for "February 28, 1975" wherever appearing therein.

Delegation of Function

Functions of the President under subsec. (c) (2) of this section delegated to the Administrator of the Federal Energy Administration, see section 2(b) of Ex. Ord. No. 11790, June 25, 1974, 39 F.R. 23185, set out as a note under section 761 of this title.

Section Referred to in Other Sections

This section is referred to in sections 754, 755, 756 of this title.

§754. Administration and enforcement; delegation of authority.

(a) (1) Except as provided in paragraph (2), (A) sections 205 through 211 of the Economic Stabilization Act of 1970 (as in effect on November 27, 1973) shall apply to the regulation promulgated under section 753(a) of this title, to any order under this chapter, and to any action taken by the President (or his delegate) under this chapter, as if such regulation had been promulgated, such order had been issued, or such action had been taken under the Economic Stabilization Act of 1970; and (B) section 212 (other than 212(b)) and 213 of such Act shall apply to functions under this chapter to the same extent such sections apply to functions under the Economic Stabilization Act of 1970.

(2) The expiration of authority to issue and enforce orders and regulations under section 218 of such Act shall not affect any authority to amend and enforce the regulation or to issue and enforce any order under this chapter, and shall not effect any authority under sections 212 and 213 insofar as such authority is made applicable to functions under this chapter.

(b) The President may delegate all or any portion of the authority granted to him under this chapter to such officers, departments, or agencies of the United States, or to any State (or officer thereof), as he deems appropriate. (Pub. L. 93-159, §5, Nov. 27, 1973, 87 Stat. 633.)

References in Text

The Economic Stabilization Act of 1970, referred to in text, is Pub. L. 91-379, which is set out as a note under section 1901 of Title 12, Banks and Banking.

Delegation of Functions

Functions of the President under this chapter delegated to the Administrator of the Federal Energy Administration, see section 2(a) of Ex. Ord. No. 11790, June 25, 1974, 39 F.R. 23185, set out as a note under section 761 of this title.

Executive Order No. 11748

Ex. Ord. No. 11748, Dec. 4, 1973, 38 F.R. 88575, formerly set out as a note under this section, which established the Federal Energy Office, was revoked by Ex. Ord. No. 11790, June 25, 1974, 39 F.R. 23165, set out as a note under section 761 of this title.

Section Referred to in Other Sections

This section is referred to in sections 752, 755, of this title.

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§755. Impact on other laws.

(a) Actions under Economic Stabilization Act of 1970.

All action duly taken pursuant to clause (3) of the first sentence of section 203(a) of the Economic Stabilization Act of 1970 in effect immediately prior to the effective date of the regulation promulgated under section 753(a) of this title, shall continue in effect until modified pursuant to this chapter.

(b) Preemption of State or local allocation regulations and orders.

The regulation under section 753 of this title and any order issued thereunder shall preempt any provision

of any program for the allocation of crude oil, residual fuel oil, or any refined petroleum product established by any State or local government if such provision is in conflict with such regulation or any such order.

(c) Antitrust laws; report to President with respect to creation or maintenance of anticompetitive trends through regulations; meetings, conferences, and communications involving persons in oil business; defenses to antitrust suits.

(1) Except as specifically provided in this subsection, no provisions of this chapter shall be deemed to convey to any person subject to this chapter immunity from civil or criminal liability, or to create defenses to actions, under the antitrust laws.

(2) As used in this subsection, the term "antitrust laws" includes—

(A) the Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890;

(B) the Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes" approved October 15, 1914;

(C) the Federal Trade Commission Act;

(D) sections 73 and 74 of the Act entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes", approved August 27, 1894; and

(E) the Act of June 19, 1936, chapter 592.

(3) The regulation promulgated under section 753 (a) of this title shall be forwarded on or before the date of its promulgation to the Attorney General and to the Federal Trade Commission, who shall, at least seven days prior to the effective date of such regulation, report to the President with respect to whether such regulation would tend to create or maintain anticompetitive practices or situations inconsistent with the antitrust laws, and propose any alternative which would avoid or overcome such effects while achieving the purposes of this chapter.

(4) Whenever it is necessary, in order to comply with the provisions of this chapter or the regulation or any orders under section 753 of this title, for owners, directors, officers, agents, employees, or representatives of two or more persons engaged in the business of producing, refining, marketing, or distributing crude oil, residual fuel oil, or any refined petroleum product to meet, confer, or communicate in such a fashion and to such ends that might otherwise be construed to constitute a violation of the antitrust laws, such persons may do so only upon an order of the President (or of an officer or agency of the United States to whom the President has delegated authority under section 754 (b) of this title); which order shall specify and limit the subject matter and objectives of such meeting, conference, or communication. Moreover, such meeting, conference, or communication shall take place only in the presence of a representative of the Antitrust Division of the Department of Justice, and a verbatim transcript of such meeting, conference, or communication shall be taken and deposited, together with any agreement resulting therefrom, with the Attorney General and the Federal Trade Commission, where it shall be made available for public inspection.

(5) There shall be available as a defense to any action brought under the antitrust laws, or for breach of contract in any Federal or State court arising out of delay or failure to provide, sell, or offer for sale or exchange crude oil, residual fuel oil, or any refined petroleum product, that such delay or failure was caused solely by compliance with the provisions of this chapter or with the regulation or any order under section 753 of this title.

(6) There shall be available as a defense to any action brought under the antitrust laws arising from any meeting, conference, or communication or agreement resulting therefrom, held or made solely for the purpose of complying with the provisions of this chapter or the regulation or any order under section 753 of this title, that such meeting, conference, communication, or agreement was carried out or made in accordance with the requirements of paragraph (4) of this subsection. (Pub. L. 93-159, §6, Nov. 27, 1973, 87 Stat. 633.)

References in Text

The Economic Stabilization Act of 1970, referred to in subsec. (a) is Pub. L. 91-379, which is set out as a note under section 1904 of Title 12, Banks and Banking.

The Act entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved July 2, 1890, referred to in subsec. (c) (2) (A), is popularly known as the Sherman Antitrust Act, and is set out in sections 1-7 of this title.

The Act entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes", approved October 15, 1914, referred to in

subsec. (c) (2) (B), is popularly known as the Clayton Act, and is set out in sections 12, 13, 14-19, 20, 21, 22-27, and 44 of this title and sections 52 and 53 of Title 20, Labor.

The Federal Trade Commission Act, referred to in subsec. (c) (2) (C), is classified to section 41 et seq. of this title.

The Act entitled "An Act to reduce taxation.—to provide revenue for the Government, and for other purposes", approved August 27, 1894, referred to in subsec. (c) (2) (D), is popularly known as the Wilson Tariff Act. Sections 73 and 74 of that Act are classified, respectively, to sections 8 and 9 of this title.

The Act of June 19, 1936, chapter 592, referred to in subsec. (c) (2) (E), is popularly known as the Robinson-Patman Antidiscrimination Act, and is classified to sections 13, 13a, 13b, and 21a of this title.

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§756. Monitoring of program by Federal Trade Commission.

(a) During the forty-five day period beginning on the effective date on which the regulation under section 753 of this title first takes effect, the Federal Trade Commission shall monitor the program established under such regulation; and, not later than sixty days after such effective date, shall report to the President and to the Congress respecting the effectiveness of this chapter and actions taken pursuant thereto.

(b) For purposes of carrying out this action, the Federal Trade Commission's authority, under sections 46,

49, and 50 of this title to gather and compile information and to require furnishing of information, shall extend to any individual or partnership, and to any common carrier subject to the Acts to regulate commerce (as such Acts are defined in section 44 of this title). (Pub. L. 93-159, §7, Nov. 27, 1973, 87 Stat. 635.)

Chapter 16B.—FEDERAL ENERGY ADMINISTRATION [NEW]

Sec.

761. Congressional declaration of purpose.

762. Establishment.

763. Officers.

(a) Administrator; appointment and compensation; supervision and direction of Administration.

(b Functions of administrator; delegation of functions.

(c) Deputy Administrators; number; appointment and compensation.

(d) Assistant Administrators; number; appointment and compensation.

(e) General Counsel, appointment and compensation.

(f) Additional officers; number; appointment and compensation; certain program assignments; competitive service provisions inapplicable.

(g) Functions of officers.

(h) Order of succession.

(i) Conflict of interest; report to Congress; publication in Federal Register; other laws applicable.

(j) Dual employment.

764. Specific functions and purposes.

765. Transfer of functions.

766. Administrative provisions.

(a) Officers and employees; appointment, employment, and compensation; authority and duties; positions in GS-16, 17, and 18; classification standards and procedures applicable; duration of authority; competitive service provisions partly inapplicable.

(b) Experts and consultants; employment and compensation.

(c) Rules, regulations, and procedures; Cost of Living Council, notification; quality of environment, publication of comments; emergency preclusion of review by Cost of Living Council.

(d) Interagency cooperation; reimbursement provisions.

(e) Seal; judicial notice.

(f) Gifts; acceptance.

(g) Contract authority.

(h) Other necessary activities.

(i) Rules, regulations, or orders; publication in Federal Register; comments; waiver of comment period; public notice, publication; views, oral presentation; transcript; adjustments; procedures respecting application and operation; administrative and judicial review; hearings; requests for action; public information; written opinions; jurisdiction of courts of appeals and district courts; defenses in any proceeding; removal of Federal questions; concurrent jurisdiction; procedures for State or local government agencies.

(j) Information for independent regulatory agencies.

767. Transitional and savings provisions.

(a) Continuance of effective status.

(b) Pending proceedings; orders, appeals, payments.

Sec.

767. Transitional and savings provisions.—Continued

(c) Commencement of suits before effective date.

(d) Litigation; abatement prohibition; Federal parties.

(e) Substitution of parties.

(f) Judicial review; other requirements respecting notices, hearings, action upon record, and administrative review; conflicting provisions.

(g) References in other laws deemed references to transferee offices or officers.

(h) Presidential functions, authorities, and delegations unaffected.

(i) References to other provisions deemed references to such provisions as amended or supplemented.

768. Incidental transfers.

769. Definitions.

770. Appointments.

(a) Interim funds.

(b) Interim appointments.

(c) Nontemporary personnel; transferee rights for one year.

(d) Compensation of new position at not less than provided for in Executive Schedule for previous position in cases of appointees without break in service.

771. Comptroller General, powers and duties.

(a) Scope of activities, monitoring activity; data to Comptroller General from Administration; reports and recommendations to Congress.

(b) Access to material and written energy information from owners or operators of facilities or business premises engaged in energy matters; scope of information.

(c) Access to material and information from recipients of Federal funds or assistance under Federal transactions.

(d) Subpenas; committee resolution; issuance; production of evidence.

(e) Enforcement of subpenas; jurisdiction; order for production of evidence; contempt.

(f) Availability to public of reports submitted to Congress; prohibited disclosures; confidential information and trade secrets; preservation of confidentiality in disclosures to Government.

772. Administrator's information-gathering power.

(a) Comprehensive and particular energy information categorical groupings; monitoring activity and policy guidance.

(b) Information and data to Administrator from owners or operators of facilities or business premises engaged in energy matters.

(c) General or special orders for filing reports or answers in writing to specific questions, surveys, or questionaires; oath or otherwise filing period.

(d) Investigations, physical inspections, inventories and samples, copies, and interrogations.

(e) Subpenas; attendance and testimony of witnesses production of evidence enforcement; judicial orders; contempt.

(f) Federal information concerning energy resources on Federal lands; scope of information.

773. Public disclosure of information.

(a) Analyses, data, information, reports, and summaries; objectives of disclosure.

(b) Freedom of Information Act applicable; disclosure of confidential information or trade secrets; disclosure of matter included in public annual reports to Securities Exchange Commission and matter excepted from such disclosure.

STATUTE EXTENDING THE EMERGENCY PETROLEUM ALLOCATION ACT OF 1973 TO NOVEMBER 15, 1975

September 26, 1975

CONGRESSIONAL RECORD—BOOSE

H 9193

Consideration in the House of Senate Amendment on HR. 9524, Extending the Emergency Petroleum Allocation Act of 1973

Mr. Staggers. Mr. Speaker, I ask unanimous consent to take from the Speaker's desk the bill (H.R. 9524) to extend the Emergency Petroleum Allocation Act of 1973, with a Senate amendment thereto, and consider the Senate amendment in the House.

The Clerk read the title of the bill.

The Clerk read the Senate amendment, as follows:

Strike out all after the enacting clause and insert:

Short Title

Section 1. This Act may be cited as the "Emergency Petroleum Allocation Act of 1975".

Extension of Mandatory Allocation Program

Sec. 2. Section 4 (g) (1) of the Emergency Petroleum Allocation Act of 1973 is amended by striking out "August 31, 1975," wherever it appears and inserting in lieu thereof "November 15, 1975."

Sec. 3. It is the intent of the Congress that the regulations promulgated under the Emergency Petroleum Allocation Act of 1973 shall be effective for the period between August 31, 1975, and the date of enactment of this Act.

Sec. 4. The purpose of this limited extension of the Emergency Petroleum Allocation Act is to provide Congress and the Executive adequate time and opportunity to reach mutual agreement on a long-term petroleum pricing policy. During the period of this extension it is the intent of the Congress that the status quo shall be maintained and the President shall institute no major change in petroleum pricing policy under section 4 (g) (2) of the Act prior to November 1, 1975. Any adjustment the President may make in price shall be in accord with his policy on inflation impact statements and economic justification set forth in Executive Order Numbered 11821 and in Circular Numbered A-107, January 28, 1975, Office of Management and Budget.

Sec. 5. Any Senate resolution to disapprove a Presidential decontrol proposal submitted under section 4 (g) (2) shall be immediately placed upon the Senate legislative calendar and any motion by the Majority Leader or his designee thereafter to proceed to the consideration of such disapproval resolution shall be decided without debate and by majority vote; and within forty-eight hours after the disapproval resolution is made the pending business or sooner if otherwise ordered by the Senate, the Chair shall direct the Clerk to call the roll on the final disposition of the disapproval resolution without any further debate or

intervening motion, any other rule or provision of law notwithstanding.

Mr. Staggers (during the reading). Mr. Speaker, I ask unanimous consent to dispense with further reading of the Senate amendment.

The Speaker. Is there objection to the request of the gentleman from West Virginia?

There was no objection.

The Speaker. Is there objection to consideration of the Senate amendment in the House?

Mr. Armstrong. Mr. Speaker, reserving the right to object, perhaps I am in doubt of our status. The information just given me is that upon the adoption of this amendment the bill will then be before the House in the Committee of the Whole.

The Speaker. No.

Mr. Armstrong. Then I have been given the wrong information. I thank the Speaker for helping me. I withdraw my reservation of objection.

The Speaker. Is there objection to consideration of the Senate amendment? The Chair hears none. The question is on the adoption of the Senate amendment.

Mr. Armstrong. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The Speaker. Evidently a quorum is not present.

The Sergeant at Arms will notify absent Members.

The vote was taken by electronic device, and there were—yeas 342, nays 16, not voting 75, as follows:

* * * * * * * *

Mr. Evans of Indiana changed his vote from "nay" to "yea."

Mr. Steelman changed his vote from "yea" to "nay."

So the Senate amendment was concurred in.

The result of the vote was announced as above recorded.

A motion to reconsider was laid on the table.

* * * * * * * *

WASHINGTON POST—TUESDAY, SEPT. 30, 1975
EMERGENCY PETROLEUM ALLOCATION ACT OF 1975 SIGNED INTO LEGISLATION BY PRESIDENT FORD

A2. Tuesday, Sept. 30, 1975 THE WASHINGTON POST

Oil Controls Reinstated Until Nov. 15

By Peter Milius
Washington Post Staff Writer

President Ford, blaming Congress for doing "nothing to reverse our growing oil dependence," yesterday signed a piece of temporizing legislation that reinstates domestic oil price controls through Nov. 15.

The President threatened to let the controls lapse completely then, unless Congress in the meantime acts to gradually phase out controls over the next several years.

The Democratic Congress, however, asserting that oil prices are already too high, has balked at a phase-out and even shown signs of wanting to vote for an oil price roll-back.

About 60 per cent of the oil produced in this country is price-controlled. This oil would more than double in price if controls were lifted, and the amount Americans pay each year for all the oil they use would increase more than 20 per cent.

The President favors this domestic price increase as a way of stimulating domestic production while discouraging consumption, and thus cutting down on petroleum imports.

But meanwhile, Mr. Ford said yesterday, it is the Democratic Congress that must take the blame for the 10 per cent oil price increase—through next June—announced over the weekend by the Organization of Petroleum Exporting Countries.

"When the price of gasoline goes up at the service station," the President said, "I want the American people to know exactly where the blame lies. Until Congress acts, there is nothing this country can do about arbitrary OPEC price hikes."

While a domestic oil price increase would be healthy, according to White House theory, a foreign increase of the sort announced Saturday has the opposite effect, mostly because it drains the country of dollars, purchasing power and jobs.

The President, repeating his familiar energy argument before television cameras as he signed yesterday's legislation, described as "nonsense" the equally familiar argument of the Democrats in Congress—that "they are trying to hold fuel prices down to protect the American consumer."

"The only way Congress can really protect the American consumer is to enact a long-range energy program that encourages Americans to produce our own energy with our own workers from our own resources at our own prices," he said.

While he wants oil price decontrol, the President is fearful of the shock that instant decontrol might have on the slowly recovering economy.

That is the reason for yesterday's bill. Controls lapsed Aug. 31, but neither side wanted to see prices spurt, and the oil companies have held up any price announcements to see what Congress will finally enact.

If Congress refuses again to enact gradual decontrol, Mr. Ford said yesterday, he hopes it will at least take steps to cushion the shock of instant decontrol. One such step he has proposed is passage of a windfall profits tax on oil producers who raise their prices; the money from the tax would be recycled to consumers through a tax cut, so they would not lose purchasing power and the recovery would not be threatened.

STATUTE EXTENDING THE EMERGENCY PETROLEUM ALLOCATION ACT OF 1973 TO DECEMBER 15, 1975

CONGRESSIONAL RECORD—HOUSE

November 14, 1975 H11229

Providing for Consideration of S. 2667, Emergency Petroleum Allocation Act Extensions

Mr. Bolling, from the Committee on Rules, reported the following privileged resolution (H. Res. 866. Rept. No. 94-666), which was referred to the House Calendar and ordered to be printed.

H. Res. 866

Resolved, That immediately upon the adoption of this resolution it shall be in order to take from the Speaker's table the bill S. 2667, to extend the Emergency Petroleum Allocation Act of 1973, and to consider said bill in the House.

Mr. Bolling. Mr. Speaker, by direction of the Committee on Rules, I call up House Resolution 866 and ask for its immediate consideration.

The Speaker. The Clerk will report the resolution.

The Clerk read the resolution.

The Speaker. The question is, Will the House now consider House Resolution 866?

The question was taken; and the Speaker announced that the ayes appeared to have it.

Mr. Rousselot. Mr. Speaker, I object to the vote on the ground that a quorum is not present and make the point of order that a quorum is not present.

The Speaker. The Chair is certain that a quorum is present. The Chair will count.

Two hundred and forty-one Members are present, a quorum.

Mr. Rousselot. Mr. Speaker, I demand a division.

On a division (demanded by Mr. Rousselot) there were—yeas 171, noes 14.

So (two-thirds having voted in favor thereof), the House agreed to consider House Resolution 866.

The Speaker. The question is on the resolution.

The resolution was agreed to.

A motion to reconsider was laid on the table.

The Speaker. The Chair recognizes the gentleman from West Virginia (Mr. Staggers).

Mr. Staggers. Mr. Speaker, pursuant to House Resolution 866, I call up the Senate bill (S. 2667) and ask for its immediate consideration in the House.

The Cleark read the title of the Senate bill.

The Clerk read the Senate bill as follows:

S. 2667

A bill to extend the Emergency Petroleum Allocation Act of 1973

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 4(g)(1) of the Emergency Petroleum Allocation Act of 1973 is amended by striking out each date specified therein and inserting in lieu thereof in each case "December 15, 1975".

Sec. 2. The amendments made in the first section of this Act to the Emergency Petroleum Allocation Act of 1973 shall take effect at midnight, November 15, 19 .

Mr. Staggers. Mr. Speaker, I move to strike the last word.

Mr. Speaker, I am pleased to report to my colleagues that the conferees of the House and Senate have reached agreement on an omnibus energy bill. The task of developing a comprehensive congressional energy program has been completed and we will be able to soon present this legislation for approval of the House.

As my colleagues, the conferees have worked long and hard to develop a bill in the spirit of compromise which we believe will be signed by the President and enacted into law. This legislation is broad in scope and truly a compromise definition of energy policy. I can pledge to you that we will work diligently to reduce the policy agreements of the conferees to legislative language, but that task will take several days.

In the interim it is incumbent upon us to extend the Emergency Petroleum Allocation Act for an addition-

al 30 days to permit a meaningful opportunity to complete work on the conference report and to allow Members an opportunity to evaluate its terms. And it is my understanding that the President has agreed to an interim extension of the act. Clearly the provisions of the Allocation Act must be extended to avoid the disruptive effects of a sudden removal of price controls during this 30-day period.

For that reason I present to my colleagues today a proposed interim extension of this act until December 15 and respectfully urge their affirmative approval.

Mr. Ketchum. Mr. Speaker, will the gentleman yield?

Mr. Staggers. I yield to the gentleman from California.

Mr. Ketchum. Mr. Speaker, I thank the gentleman for yielding.

I am thrilled that he has seen fit to go to the Committee on Rules and to do this in an orderly way.

I would vote "no" on this. I am opposed to control, as the gentleman well knows, but I am glad to see that we are doing this the right way at this time.

Mr. Dingell. Mr. Speaker, during previous consideration of an extension of the Emergency Petroleum Allocation Act the question of notice to all interested persons regarding the retroactive application of such an extension was debated. That debate indicated that it was the intent of Congress to extend the Allocation Act without hiatus and that any such extension would retroactively take effect. The extension we have passed today should be interpreted in light of this history and prior debate. As further indication of this intent, I include as part of this statement the ruling of the Federal Energy Administration regarding retroactive extension of the Allocation Act:

Application of FEA's Mandatory Petroleum Price and Allocation Regulations During September 1975

The expiration of the Emergency Petroleum Allocation Act of 1973 ("EPAA of 1973") on August 31, 1975 and the subsequent extension of that law by adoption of the Emergency Petroleum Allocation Act of 1975 ("EPAA of 1975"), which was signed by the President and became law on September 29, 1975, have raised a number of questions regarding the application of the FEA's regulations to transactions that occurred during the hiatus period of September 1 to September 29. The purpose of this Ruling is to give notice of the manner in which the FEA regulations apply to transactions occurring during that period.

I. Background

S. 1849, which would have simply changed the expiration date in §4(g)(1) of the EPAA of 1973 from August 31, 1975 to February 28, 1976, was passed by Congress on July 31, 1975. The President vetoed S. 1849 on September 9, 1975, and the veto was sustained by the Senate the following day.

Although S. 1849 passed the Congress a month prior to the scheduled expiration of the EPAA of 1973, it was contemplated at the time of its passage that the bill might not be sent to the President until late August, that the

President was likely to veto it, and that it would become law only if Congress overrode the veto—which would occur at the earliest a few days after the August 31, 1975 expiration date. Thus, in the floor debate on S. 1849, several key proponents of the bill in the House made it clear that:

"It is the intent of the Congress that the extension of the allocation act included in S. 1849 take effect immediately and retroactively in the event of a veto and an override of that veto, and that there be no hiatus or gap during which violations of these regulations would not be subject to civil sanctions." 121 Cong. Rec. H 7955 (daily ed., July 31, 1975) (remarks of Cong. Dingell). *See also id.* at H7956-57.

During the month of August it became apparent that the President would indeed veto S. 1849 because he believed the six-month extension provided for therein would unnecessarily delay the resolution of the difficult energy issues confronting the Nation. However, on August 29, 1975, the President informed the Majority Leader of the Senate and the Speaker of the House that he would be willing to sign a short-term (approximately 30 to 45 day) extension of the Act if he received assurances that during the extension period the Congress would act to adopt a phased decontrol program. On that date FEA Administrator Frank G. Zarb issued a public statement, widely reported in the press, that:

"A short-term extension, if signed by the President, would be applied retroactively. Since the Congress does not return until September 2, there would be a short gap in the Allocation Act authority between the August 31 expiration of current authority and any possible Congressional action on the short extension. It is likely, however, that the Congress will intend no regulatory gap and will intend to reinstate automatically the price and allocation regulations in effect on August 31 with the passage of any short extension.

"FEA, in consultation with the Department of Justice, has reviewed the legal effects of such a gap and concluded that by an extension the Congress can revive the current controls retroactively to September 1. If the President signs such a short extension, appropriate regulatory action can then be taken to correct any transactions in violation of FEA's current controls that occurred during the gap."

There was substantial commentary in the trade press and elsewhere to the effect that the reinstitution of controls would, and could legally apply retroactively to September 1. For example, the September 12 edition of the *Oil Daily* commented that:

"All this points to the wisdom that oil companies must still act as if controls were in place unless there is more assurance that decontrol will stick. Any action taken outside of the mandates of the defunct EPAA might be subject to expensive adjustments when Congress makes up its mind on the issue of oil company regulation."

On September 11, 1975, the day following the Senate's vote to sustain the veto of S. 1849, the House unanimously passed H.R. 9524, which would have extended the EPAA of 1973 for 60 additional days after September 1. The bill passed the Senate with certain amendments, including an expiration date of November 15, 1975

on September 26, 1975. The house concurred in the Senate amendments on the same day, and the EPAA of 1975 was signed into law by the President on September 29, 1975.

The EPAA of 1975 expressly states that the FEA regulations in effect on August 31, 1975 are to be considered reinstituted in full force and effect retroactive to that date:

"Sec. 3. It is the intent of the Congress that the regulations promulgated under the Emergency Petroleum Allocation Act of 1973 shall be effective for the period between August 31, 1975, and the date of enactment of this Act."

In the floor debate on this amendment, Representative Staggers, the Chairman of the House Committee on Interstate and Foreign Commerce, stated:

"It is the intent of both bodies of the Congress that the pricing and allocation controls contained in Federal Energy Administration regulations which were promulgated under that act continue in effect as though there had been no hiatus. Both the administration and leaders of the Congress have repeatedly stated that any extension of the Allocation Act finally agreed to would be retroactive in character. The industry has had ample notice of this matter.

"Accordingly, the Federal Energy Administration is called upon to enforce their regulations as if they had remained in full effect in the period it has taken for the Congress and the President to agree upon the terms of an extension of the act. In this regard the FEA will be expected to order a rollback and refunding of any price increases which may have occurred on or after September 1 and take other appropriate action to assure the continuity and integrity of the distribution system for petroleum products." 121 Cong. Rec. H 9193 (daily ed., September 26, 1975).

Similarly, Senator Jackson, Chairman of the Senate Interior Committee, stated in connection with H.R. 9524, as amended, that "the extension restores petroleum price controls, on a retroactive basis to September 1, until November 15, 1975." 121 Cong. Rec. S 16866 (daily ed., September 26, 1975).

Judicial precedent supports the FEA's and the Congress' determination of that enactment of the EPAA of 1975 can lawfully reinstate the FEA's Mandatory Petroleum Allocation and Price Regulations as though they were continuously in force during the hiatus period, particularly where there was, as in this case, a clear expression of Congress' intention in this regard and extensive notice to the public that the EPAA of 1973 would be extended on a retroactive basis. See *Porter v. Senderowitz,* 158 F. 2d 435 (3d Cir. 1946), *cert. denied,* 330 U.S. 848 (1947); *Porter v. Shibe,* 158 F. 2d 68 (10th Cir. 1946); *Purvis v. United States,* 501 F. 2d 311 (9th Cir. 1974); *First National Bank v. United States,* 420 F. 2d 725 (Ct. Cl.), *cert. denied,* 398 U.S. 950 (1970).

II. Guidelines for Determining Compliance With the FEA Regulations

A. Civil remedies

Since the EPAA of 1975 reinstitutes the FEA Mandatory Petroleum Allocation and Price Regulations (Parts

210, 211, and 212, Chapter II of Title 10, Code of Federal Regulations) in effect on August 31, 1975 retroactive to that date, as stated above, FEA will apply its allocation and price regulations as though they had been in effect continuously since August 31, 1975. Persons subject to the regulations should carry out September transactions as though the EPAA of 1975 had been enacted prior to September 1, 1975.

This means, at a minimum, that any supplier/purchaser relationships terminated during the hiatus contrary to the regulations must be immediately reestablished and that that portion of prices charged during the hiatus in excess of amounts permitted by the regulations must immediately be refunded or rolled back. It is recognized, however, that in other types of cases, particularly in the allocation area, there may be some practical difficulties in retroactively implementing measures that will result in strict adherence to all other regulations during the hiatus period. Thus, whether the FEA will require that steps other than reestablishing supplier/purchaser relationships and refunding overcharges be taken to remedy violations of the regulations during the hiatus will be determined on a case-by-case basis, depending upon the practical difficulties in doing so, the extent of injury already incurred by any person and the degree to which further remedy would amount to a penalty on any person.

Corrective actions to conform transactions during the hiatus to the regulations should be voluntarily undertaken by the firms involved as soon as possible. For example, supplier/purchaser relationships that were terminated during the hiatus period contrary to the regulations in effect

on August 31 should be reestablished promptly. Prices charged in excess of amounts permitted by the regulations in effect on August 31 should be refunded where the overcharged customers are identifiable and, with respect to unidentifiable customers, should be "rolled back" through a reduction in the *current* (as opposed to the maximum lawful) selling price until the full amount of the overcharge is returned to the marketplace. To insure that proper credit is given by the FEA for the rollback or refund of prices charged during the hiatus period, firms are advised to keep detailed records of any corrective action taken and to advise the FEA of such corrective action. Firms that have questions concerning the form of remedy that will be acceptable to the FEA should seek guidance from the FEA as soon as possible.

The FEA will audit transactions that occurred during the hiatus period in the normal course of its compliance program. To the extent that violations are found not to have been remedied, the FEA, as part of its normal compliance efforts, intends to issue remedial orders and take such other action as is authorized by regulations to secure compliance with the regulations and to remedy violations that occurred during the hiatus.

B. Civil and criminal penalties

The *ex post facto* clause of the U. S. Constitution limits the authority of Congress to apply a criminal statute retroactively. Therefore, it is the FEA's intention not to seek criminal penalties for willful violations of FEA regulations that occurred during the hiatus period.

It is less certain that the *ex post facto* clause applies to a statute that imposes civil penalties, as does the EPAA of 1973, as amended by the EPAA of 1975, although due process considerations of course remain applicable. Therefore, while as a general rule the FEA will not seek civil penalties for violations that occurred during the hiatus period, it expressly reserves the right to do so if the factual circumstances of a particular case appear to warrant such action.

Finally, while the FEA's authority to seek civil or criminal penalties for violations that occurred during the hiatus may be limited, the FEA does not consider such limitations to apply to violations of lawful orders issued after the hiatus period to remedy violations that occurred during the hiatus. As noted above, the FEA intends to issue orders after the hiatus period to remedy violations that occurred during the hiatus. Notwithstanding the FEA's general intent not to seek civil or criminal penalties for *violations of the regulations* during the hiatus period, a firm that willfully refuses to comply with a *remedial or other order* issued by the FEA to remedy a violation that occurred during the hiatus period will be fully subject to the civil and criminal penalties provided for in Section 5(a) of the EPAA of 1973 and Section 208 of the Economic Stabilization Act.

III. Compliance With Price Regulations, Illustrative Examples

The following examples illustrate how the FEA's Mandatory Petroleum Price Regulations will be applied to transactions that occurred during the period September 1 to September 29, 1975.

Example 1 (Producers): On September 2, 1975, Firm A, a producer of crude oil, sold 100 barrels of crude oil to Firm B, a refiner. Of the 100 barrels, 60 barrels were old crude oil subject to the ceiling price rule contained in §212.73 of the regulations, and 40 barrels were new and released crude oil pursuant to §212.74 of the regulations. Payment was made September 17, 1975 for all 100 barrels at the free market prices for new and released crude oil.

Firm A is required to present to Firm B a revised invoice that correctly states the volumes of old, new, and released oil sold on September 2, 1975 and specifies that payment for 60 barrels is to made at or below the ceiling price for old crude oil, in accordance with §212.73, and that payment for 40 barrels is to be made at the September 2, 1975 posted or free market price for new and released crude oil, in accordance with §212.74 and with Ruling 1974-11, "New" and "Released" Crude Oil (Current Free Market Price Under §212.74). Amounts paid by Firm B in excess of the corrected prices shall be refunded.

Example 2 (Refiners): Firm B, a refiner, entered into the above transaction. For purposes of §§212.82 and 212.83, in computing prices for October, Firm B's cost of crude oil for the month of measurement September must be computed according to the corrected invoices presented by Firm A. Prices charged by Firm B in October in excess of amounts permitted by the regulations (including amounts carried forward from previous months and available in accordance with §212.83(e)) shall be refunded to identifiable customers and, to the extent its customers cannot be identified, shall be "rolled back" in the form of re-

ductions from current (as opposed to maximum lawful) selling prices.

Example 3 (Refiners): Firm B, a refiner, anticipating increased costs of crude oil purchased during September, began on September 1 to charge prices for refined petroleum products based on September costs of crude oil at free market price levels. In applying the formulae in §212.83 to compute prices for September, Firm B's cost of crude oil must be computed from costs for crude oil purchased or landed in August, the month of measurement, and may not include the cost of crude oil purchased or landed in September. Prices charged by Firm B in September in excess of maximum lawful prices permitted by §§212.82 and 212.83 of the regulations (including amounts carried forward from previous months and available in accordance with §212.83(e)) shall be refunded to identifiable customers and, to the extent its customers cannot be identified, shall be "rolled back" in the form of reductions from current (as opposed to maximum lawful) selling prices.

Example 4 (Resellers): Firm C, a reseller, purchased refined products from Firm B in the circumstances of Example 2 and received a refund of overcharges in September by Firm B. Firm C is required to recalculate its product costs in the month of September to reflect the refund and to make appropriate refunds or rollbacks to its customers to the extent that the recalculation has resulted in its own prices having been in excess of prices permitted by the regulations. That is, Firm C, is similarly required to make appropriate refunds or rollbacks of prices charged in September in excess of amounts permitted by §§212.92

and 212.93 of the regulations (including amounts carried forward from previous months in accordance with §212.93(e) and available in accordance with §212.93(g)).

Example 5 (Leases): Firm E, a refiner, is the lessor of real property used by Firm F in retailing gasoline. On September 2, 1975, Firm E notified Firm F of its intent to exercise the lease termination clause of their contract because of Firm F's failure to convert to a 24-hour per day operation. Firm F did not operate 24 hours per day at any previous time.

Firm E's notice violates §212.103(c) of the regulations and is therefore void.

Example 6 (Leases): Firm E, a refiner, is the lessor of real property used by Firm G in retailing gasoline. On September 2, 1975, Firm E notified Firm G of its intent to exercise a lease clause permitting it to increase the rent up to 50%.

Firm E's notice is void, and Firm G is entitled to a refunds of any rent already paid by it in excess of the amounts provided for in §212.103(a) of the regulations.

IV. Compliance With Allocation Regulations, Illustrative Examples

The following examples and discussion illustrate how the FEA's Mandatory Petroleum Allocation Regulations will be applied with regard to the September 1-29 hiatus period.

Example 7 (Supplier/wholesale purchaser relationships): Supplier H is the base period supplier of middle distillates to Firm J, a wholesale purchaser-reseller, and

Firm K, a wholesale purchaser-consumer. On September 1, 1975, Supplier H notified Firms J and K that it would no longer supply them.

Supplier H must continue to supply Firm J since under §211.9(a) (2) (i), supplier/wholesale purchaser-reseller relationships are fixed for the duration of the allocation program and may not be modified or terminated without FEA approval.

Supplier H must also continue to supply Firm K since supplier/wholesale purchaser-consumer relationships are also established for the duration of the program, as provided in §211.9(a) (2) (ii), unless the parties have given their mutual consent to the termination of the supplier/purchaser relationship. Only if Supplier H and Firm K had so consented and could establish that their consent was in fact mutual and voluntary, would their supplier/purchaser relationship be considered terminated.

Example 8 (New supplier/wholesale purchaser relationships): During September, 1975, Supplier H entered into a contract to supply middle distillates to Firm L, a wholesale purchaser-reseller, and also agreed to supply Firms M and N, both wholesale purchaser-consumers. On September 1, 1975, Firm M and its base period supplier had mutually consented to terminate their supplier/purchaser relationship. Firm N had been notified that its base period supplier no longer intended to supply it.

The supply contract between Supplier H and Firm L does not establish a valid supplier/wholesale purchaser-reseller relationship because FEA approval has not been obtained as required by §211.12(a) (2) (ii). Unless Firm

L is without a base period supplier or a new supplier as provided in §211.10(e) (1), it may not even apply to FEA for assignment of Supplier H as its base period supplier.

The supply arrangement between Supplier H and Firm M may continue as a mutual arrangement as contemplated by §211.12(e) (1). This new supplier/purchaser relationship is subject to the notice and approval provisions of §211.12(e) (1) (ii) and (iii).

In the case of Firm N, however, the new relationship between it and Supplier H is not valid unless Firm N now arranges by mutual consent to terminate its supplier/purchaser relationship with its base period supplier, which unilaterally refused to supply it during September. If that termination is effected, Firm N is considered to have been without a base period supplier and is therefore able to enter into a mutual supply arrangement with Supplier H as provided by §211.12(e) (1). In this event, the notice and approval provisions of §211.12(e) (1) (ii) and (iii) apply.

Supplier H may, of course, supply purchasers with which it has no supplier/purchaser relationship to the extent that it has surplus product and has complied with the provisions of §211.10(g).

Example 9 (Crude oil supplier/purchaser rule): On September 1, 1975 Firm O, a crude oil producer, contracted for the sale of its production to Firm P, to whom Firm O had never previously sold. Prior to September 1, 1975, Firm O had sold its production to Firm Q, which had purchased Firm O's production under a supplier/purchaser relationship in effect pursuant to §211.63(a). Firm Q did

not consent to the termination of its supplier/purchaser relationship with Firm O. Therefore, Firm Q continues to be entitled to purchase Producer O's production for the month of September 1975 and thereafter, except as to September 1975 production where the sale and delivery thereof to Firm Q is no longer feasible because it is no longer within Firm O's possession or control as of the date this ruling is published in the *Federal Register*. Crude Oil which Firm O is otherwise contractually required to supply to Firm P but is still in Firm O's possession or control as of such publication date shall be delivered to Firm Q. This result would be identical if a broker or reseller, instead of Firm O, were the supplier to Firm Q.

In general, pursuant to the crude oil supplier/purchaser rule set forth in 10 CFR 211.63, all supplier/purchaser relationships in effect under contracts for sales, purchases, and exchanges of domestic crude oil on December 1, 1973 are required to remain in effect for the duration of the Mandatory Allocation Program. In accordance with the provisions of the EPAA of 1975, as a general rule, all crude oil supplier/purchaser relationships in effect under §211.63 immediately prior to the period September 1 to 29, 1975 are required to be maintained in effect under §211.63 for the period subsequent to August 31, 1975 during which the EPAA of 1973, as amended, is in effect.

If a valid termination under §211.63 of Firm Q's supplier/purchaser relationship had been effected as of September 1, 1975, Firm O would no longer be required to sell its crude oil to Firm Q. Supplier/purchaser relationships required to be maintained under §211.63 may be terminated by mutual consent of both parties and, as to new and released crude oil, may be terminated where the pres-

ent purchaser of the crude oil refuses, after notice by the seller, to meet any bona fide offer for the crude oil by another purchaser at a higher lawful price. As to terminations by mutual consent, FEA has consistently ruled that any consent to such a termination must be made affirmatively in writing in light of the provisions of §211.63. Accordingly, supplier/purchaser relationships in effect on August 31, 1975 may be terminated in the period September 1 to September 29, 1975 in the manner prescribed in §211.63. No termination in this period is valid under §211.63 unless effected in accordance with the provisions of that section.

Example 10 (Old oil allocation program): From September 1 to September 28, 1975 Firm R, a crude oil producer, sold its production to Firm S, a refiner. Firm R's entire production is classified as old crude oil under §212.72 and therefore constitutes old oil (as defined in §211.62) for purposes of the old oil allocation program set forth in §211.67. All of such sales were made at a price in excess of the lawful ceiling price as computed under §212.73.

Firm S must include the crude oil purchased from Firm R its crude oil receipts (in accordance with the provisions of §211.62) and must report these particular receipts as old oil for purposes of §211.66 and §211.67, in accordance with the certification under §212.131 received by Firm S from Firm R, regardless of the fact that Firm S may have paid an exempt price for the crude oil. Firm S's remedy in this case is to seek a refund from Firm R (under the procedures set forth in Example 1 above) for these sales made at a price in excess of the lawful ceiling price.

Mr. Speaker, as Chairman Staggers has already indicated, the House-Senate conference on a comprehensive energy bill has concluded its work. The final preparation of this congressionally sponsored energy program is now underway.

The process of developing this program commenced 10 months ago. The Subcommittee on Energy and Power held over 3 full weeks of hearings on the subjects embraced in this legislation. The subcommittee met in 28 sessions over 18 legislative days to mark up the bill. The full Interstate and Foreign Commerce Committee met in 13 markup sessions before reporting the bill. The House began consideration of this subject matter in July and did not conclude deliberations on the bill until September 23. The conferees on this legislation have met almost daily since then to work out the final details of a comprehensive congressional energy program which we are confident will be signed into law by the President. The description of the legislative process which I have just outlined gives an indication of the complexity and breadth of this legislation. As this process approaches its final stage, we are confronted by the expiration of current energy controls under the Allocation Act at midnight November 15.

In October the President agreed to accept an extension of the Allocation Act for the limited purpose of giving the Congress an opportunity to reach final agreement on a comprehensive energy bill which he could sign. That agreement has been reached and we are confident the President can sign this legislation. We have kept faith with the understanding with the President and concluded the task. However, because of the truly comprehensive scope of this legislation, a further short period of extension of current

controls will be necessary to reduce to legislative language the terms of the conference agreement.

The conferees have in good faith worked diligently to come to agreement with the President. The President's representatives have dealt in good faith with the conferees. The extension we seek is not for purpose of delay or further time for compromise. The extension is to permit the already agreed upon compromise to be implemented.

Mr. Speaker, I am confident the President can accept this extension and will ultimately sign the energy bill now in the process of final drafting. I hope my colleagues will agree with me that this extension is warranted, responsible and in the public interest.

Mr. Staggers. Mr. Speaker, I move the previous question on the Senate bill.

The previous question was ordered.

The Senate bill was ordered to be read a third time, was read the third time, and passed, and a motion to reconsider was laid on the table.

GENERAL LEAVE

Mr. Dingell. Mr. Speaker, I ask unanimous consent that all Members may have 5 legislative days in which to revise and extend their remarks on the Senate bill just passed.

The Speaker. Is there objection to the request of the gentleman from Michigan?

There was no objection.

PERMISSION FOR COMMITTEE ON AGRICULTURE TO HAVE UNTIL MIDNIGHT, SATURDAY, NOVEMBER 15, 1975, TO FILE CONFERENCE REPORT ON H.R. 8841

Mr. Foley. Mr. Speaker, I ask unanimous consent that the Committee on Agriculture may have until midnight Saturday, November 15, 1975, to file a conference report on the bill (H.R. 8841) to extend the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and for other purposes.

The Speaker. Is there objection to the request of the gentleman from Washington?

There was no objection.

REQUEST TO AUTHORIZE CLERK TO RECEIVE MESSAGES FROM THE SENATE AND THE SPEAKER TO SIGN ENROLLED BILLS AND JOINT RESOLUTIONS NOTWITHSTANDING ADJOURNMENT

Mr. McFall. Mr. Speaker, I ask unanimous consent that, notwithstanding the adjournment of the House until Monday next, the Clerk be authorized to receive messages from the Senate, and that the Speaker be authorized to sign any enrolled bills and joint resolutions duly passed by the two Houses and found truly enrolled.

The Speaker. Is there objection to the request of the gentleman from California?

Mr. Rousselot. Mr. Speaker, I object.

The Speaker. Objection is heard.

LEGISLATIVE PROGRAM

(Mr. Edwards of Alabama asked and was given permission to address the House for 1 minute and to revise and extend his remarks.)

Mr. Edwards of Alabama. Mr. Speaker, I would like to ask the majority whip or the majority leader what the program for the coming week is.

Mr. McFall. If the gentleman will yield, I will be glad to respond to the gentleman's inquiry.

The program for the House of Representatives for the week of November 17, 1975, is as follows:

On Monday we will have the Consent Calendar and the following suspensions, on which the votes will be postponed until the end of all suspensions:

H.R. 10284, medicare deadline amendments;

H.R. 8618, Occupational Safety and Health Act amendments; and

H.R. 10283, Real Estate Settlement Procedures Act amendments;

H.R. 10561, Fair Credit Billing Act amendments;

S.1245, Alaska highway;

S.364, Forest Service roads;

H.R. 9691, review of certain disability retirement by Secretary of Defense;

S.2114, pay of nuclear qualified officers;

H.R. 8089, per diem expenses of service members on official business;

H.R. 9573, 60-days pay for accrued service leave;

H.R. 9570, sale and shipment of carbonyl chloride by Defense Department;

H.R. 5630, Government share of State boat safety programs;

H.R. 6851, retired pay for lighthouse service; and

H.R. 1535, benefits for widows of lighthouse service.

Then we will take up H.R. 10481, the Intergovernmental Emergency Assistance Act, otherwise referred to as the New York City legislation under an open rule with 3 hours of debate. We will take up general debate only on Monday.

Then on Tuesday, Wednesday and Thursday, we will have the Private Calendar, then there is one suspension, S.6, education of handicapped children conference report, followed on the regular calendar by H.R. 10481, the Intergovernmental Emergency Assistance Act, a continuation of the New York legislation.

Then we will take up H.R. 10612, tax reform, subject to a rule being granted.

H.R. 8578, restoration of Federal Matching share to community action agencies, also subject to a rule being granted.

Senate Joint Resolution 121, quarterly adjustments of support prices for milk, with an open rule and 1 hour of debate.

And then, H.R. 30, Hell's Canyon National Recreation Area, subject to a rule being granted.

Conference reports, of course, as the Members know, may be brought up at any time and any further program will be announced later.

I would like to announce that the House will adjourn from the close of business on Thursday, November 20, until noon Monday, December 1.

As the Members can see, we have listed all 14 suspensions, but if the general debate on the New York legislation is on for Monday, then we can go ahead with the general debate on that bill and we will not necessarily take all of the suspensions. We will, however, take up at least H.R. 10284, H.R. 8618, H.R. 10283, and H.R. 9691.

We will announce this at the start of the day's program on Monday. The other suspensions in that case would be delayed until after the Thanksgiving recess.

I will be glad to respond to any questions that the gentleman might have.

Mr. Edwards of Alabama. Does the gentleman from California have any thought that the energy conference report will be up for next week?

Mr. McFall. I am advised that it will not be up for next week.

Mr. Edwards of Alabama. I would further inquire as to whether we have now completed all of the business for today and for this week?

Mr. McFall. The gentleman is correct, we have.

Mr. Bauman. Mr. Speaker, if the gentleman will yield, the gentleman from California did tell us that the

decision as to whether we will take up all of the suspensions, including the New York aid bill, will not be announced until Monday. It is very difficult for me to understand why the Members could not be informed this afternoon. I believe that many of the Members would probably like to make plans on the basis of what the legislation is that the leadership plans to bring up. But apparently we will not know this until Monday. Why can we not bring up the New York aid bill on Monday, why cannot we know this this afternoon?

Mr. McFall. I am informed that the chairman of the committee has requested that procedure. As I am sure the gentleman knows, there are negotiations going on on the New York aid bill. The Governor of New York is out in the Rayburn Room at the present time discussing the matter. The President and his staff are talking about this. There are continual negotiations going on in an attempt to remedy this very important matter to the country. It could be that further negotiations may be necessary and that we would not begin the general debate on Monday. In that case, of course, we would want the House to have a full calendar, so we have listed all of the suspensions. If, however, the debate does start, and we are in a position to go ahead with the New York bill, then we will not have to delay it until the next day then I think it would be preferable not to take all of the suspensions because it might make the work day a rather long one.

Mr. Bauman. If we do, indeed, start general debate on the New York bill Monday, is it the intention of the leadership to follow it through the full 3 hours of debate no matter how late that would run?

Mr. McFall. I believe so, I can say to the gentleman, although I cannot say for sure for the committee, but I would think that this would be the most reasonable course in view of the fact that we have a 4-day week next week and other important legislation. We ought to finish it by Monday at least if we are going to take it up on Thursday.

Mr. Bauman. I thank the gentleman for his explanation.

ECONOMIC STABILIZATION ACT OF 1970

TITLE 12—BANKS AND BANKING §1904

"§201. Short title

"This title may be cited as the 'Economic Stabilization Act of 1970'.

"§202. Findings

"It is hereby determined that in order to stabilize the economy, reduce inflation, minimize unemployment, improve the Nation's competitive position in world trade, and protect the purchasing power of the dollar, it is necessary to stabilize prices, rents, wages, salaries, dividends, and interest, and that in order to maintain and promote competition in the petroleum industry and assure sufficient supplies of petroleum products to meet the essential needs of various sections of the Nation, it is necessary to provide for the rational and equitable distribution of those products. The adjustments necessary to carry out this program require prompt judgments and actions by the executive branch of the Government. The President is in a position to implement promptly and effectively the program authorized by this title.

"§203. Presidential authority

"(a) The President is authorized to issue such orders and regulations as he deems appropriate, accompanied by a statement of reasons for such orders and regulations, to—

"(1) stabilize prices, rents, wages, and salaries at levels not less than those prevailing on May 25, 1970, except that prices may be stabilized at levels below those prevailing on such date if it is necessary to eliminate windfall profits or if it is otherwise necessary to carry out the purposes of this title;

"(2) stabilize interest rates and corporate dividends and similar transfers at levels consistent with orderly economic growth; and

"(3) provide after public hearing, conducted with such notice, under such regulations and subject to such review as the exigencies of the case may, in his judgment, make appropriate for the establishment of priorities of use and for systematic allocation of supplies of petroleum products including crude oil in order to meet the essential needs of various sections of the Nation and to prevent anticompetitive effects resulting from shortages of such products.

Such orders and regulations shall provide for the making of such adjustments as may be necessary to prevent gross inequities, and shall be consistent with the standards issued pursuant to subsection (b).

"(b) In carrying out the authority vested in him by subsection (a), the President shall issue standards to serve as a guide for determining levels of wages, salaries, prices, rents, interest rates, corporate dividends, and similar transfers which are consistent with the purposes of this title and orderly economic growth. Such standards shall—

"(1) be generally fair and equitable;

"(2) provide for the making of such general exceptions and variations as are necessary to foster or-

derly economic growth and to prevent gross inequities, hardships, serious market disruptions, domestic shortages of raw materials, localized shortages of labor, and windfall profits;

"(3) take into account changes in productivity and the cost of living, as well as such other factors consistent with the purposes of this title as are appropriate;

"(4) provide for the requiring of appropriate reductions in prices and rents whenever warranted after consideration of lower costs, labor shortages, and other pertinent factors; and

"(5) call for generally comparable sacrifices by business and labor as well as other segments of the economy.

"(c) (1) The authority conferred on the President by this section shall not be exercised to limit the level of any wage or salary (including any insurance or other fringe benefit offered in connection with an employment contract) scheduled to take effect after November 13, 1971, to a level below that which has been agreed to in a contract which (A) related to such wage or salary, and (B) was executed prior to August 15, 1971, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(2) The President shall promptly take such action as may be necessary to permit the payment of any wage or salary increase (including any insurance or other fringe benefit offered in connection with an employment contract) which (A) was agreed to in an employment con-

tract executed prior to August 15, 1971, (B) was scheduled to take effect prior to November 14, 1971, and (C) was not paid as a result of orders issued under this title, unless the President determines that the increase provided in such contract is unreasonably inconsistent with the standards for wage and salary increases published under subsection (b).

"(3) In addition to the payment of wage and salary increases provided for under paragraphs (1) and (2), beginning on the date on which this subsection takes effect, the President shall promptly take such action as may be necessary to require the payment of any wage or salary increases (including any insurance or other fringe benefits offered in connection with employment) which have been, or in the absence of this subsection would be, withheld under the authority of this title, if the President determines that—

"(A) such increases were provided for by law or contract prior to August 15, 1971; and

"(B) prices have been advanced, productivity increased, taxes have been raised, appropriations have been made, or funds have otherwise been raised or provided for in order to cover such increases.

"(d) Notwithstanding any other provisions of this title, this title shall be implemented in such a manner that wage increases to any individual whose earnings are substandard or who is a member of the working poor shall not be limited in any manner, until such time as his earnings are no longer substandard or he is no longer a member of the working poor. The President shall prescribe regulations defining for the purposes of this subsection the term 'substandard earnings', but in no case shall such term

be defined to mean earnings less than those resulting from a wage or salary rate which yields $3.50 per hour or less.

"(e) Whenever the authority of this title is implemented with respect to significant segments of the economy, the President shall require the issuance of regulations or orders providing for the stabilization of interest rates and finance charges, unless he issues a determination, accompanied by a statement of reasons, that such regulations or orders are not necessary to maintain such rates and charges at levels consonant with orderly economic growth.

"(f) The authority conferred by this section shall not be exercised to preclude the payment of any increase in wages—

"(1) required under the Fair Labor Standards Act of 1938, as amended [section 201 et seq. of Title 29], or effected as a result of enforcement action under such Act; or

"(2) required in order to comply with wage determinations made by any agency in the executive branch of the Government pursuant to law for work (A) performed under contracts with, or to be performed with financial assistance from, the United States or the District of Columbia, or any agency or instrumentality thereof, or (B) performed by aliens who are immigrants or who have been temporarily admitted to the United States pursuant to the Immigration and Nationality Act [section 1101 et seq. of Title 8]; or

"(3) paid in conjunction with existing or newly established employee incentive programs which are designed to reflect directly increases in employee productivity.

"(g) For the purposes of this title, the term 'wages' and 'salaries' do not include reasonable contributions by any employer pursuant to a compensation adjustment for—

"(1) any pension, profit sharing, or annuity and savings plan which meets the requirements of section 401(a), 404(a)(2), or 403(b) of the Internal Revenue Code of 1954 [section 401(a), 404(a)(2), or 403(b) of Title 26]:

"(2) any group insurance plan; or

"(3) any disability and health plan;

unless the President determines that the contributions for such purposes made by any such employer are unreasonably inconsistent with the standards for wage, salary, and price increases issued under subsection (b) or under any other provision of this title. Employees in all industries subject to controls under this title shall be treated equally for purposes of this title.

"(h) No State or portion thereof shall be exempted from any application of this title with respect to rents solely by virtue of the fact that it regulates rents by State or local law, regulation of policy.

"(i) Rules, regulations, and orders issued under this title shall insofar as practicable be designed to encourage labor-management cooperation for the purpose of achieving increased productivity, and the Executive Director of the National Commission on Productivity shall when appropriate be consulted in the formulation of policies, rules, regulations, orders, and amendments under this title.

"(j) Nothing in this title may be construed to authorize or require the withholding or reservation of any obligational authority provided by law or of any funds appropriated under such authority.

"§204 Delegation

"The President may delegate the performance of any function under this title to such officers, departments, and agencies of the United States as he deems appropriate, or to boards, commissions, and similar entities composed in whole or in part of members appointed to represent different sectors of the economy and the general public. Members of such boards, commissions, and similar entities shall be appointed by the President by and with the advice and consent of the Senate, except that—

"(1) the foregoing requirement with respect to Senate confirmation does not apply to any member of any such board, commission, or similar entity (other than the Chairman of the Pay Board, established by section 7 of Executive Order Numbered 11627 of October 15, 1971, and the Chairman of the Price Commission, established by section 8 of such Executive Order) who is serving, pursuant to appointment by the President, on such board, commission, or similar entity on the date of enactment of the Economic Stabilization Act Amendments of 1971 [Dec. 22, 1971], and who continues to serve, pursuant to such appointment, on such board, commission, or similar entity after such date; and

"(2) any person serving in the office of Chairman of such Pay Board, and any person serving in the office of Chairman of such Price Commission, on the date of enactment of the Economic Stabilization Act Amendments of 1971 [Dec. 22, 1971], may continue to serve in such capacity on an interim basis without regard to the foregoing requirement with respect to Senate confirmation until the expiration of sixty days after the date of enactment of the Economic Stabilization Act Amendments of 1971 [Dec. 22, 1971]; and the provisions of sections 910-913 of title 5, United States Code, shall be applicable with respect to the procedure to be followed in the Senate in considering the nomination of any person to either of such offices submitted to the Senate by the President during such sixty-day period, except that references in such provisions to a 'resolution with respect to a reorganization plan' shall be deemed for the purpose of this section to refer to such nominations.

Where such boards, commissions, and similar entities are composed in part of members who serve on less than a full-time basis, legal authority shall be placed in their chairmen who shall be employees of the United States and who shall act only in accordance with the majority vote of members. Nothing in sections 203, 205, 207, 208, or 209 of title 18, United States Code, shall be deemed to apply to any member of any such board, commission, or similar entity who serves on less than a full-time basis because of membership on such board, commission, or entity.

"§205. Confidentiality of information; public disclosure

"(a) Except as provided in subsection (b), all information reported to or otherwise obtained by any person exercising authority under this title which contains or relates to a trade secret or other matter referred to in section 1905 of title 18, United States Code, shall be considered confidential for the purposes of that section, except that such information may be disclosed to other per-

sons empowered to carry out this title solely for the purpose of carrying out this title or when relevant in any proceeding under this title.

"(b) (1) Any business enterprise subject to the reporting requirements under section 130.21 (b) of the regulations of the Cost of Living Council in effect on January 11, 1973, shall make public any report (except for matter excluded in accordance with paragraph (2) so required which covers a period during which that business enterprise charges a price for a substantial product which exceeds by more than 1.5 per centum the price lawfully in effect for such product on January 10, 1973, or on the date twelve months preceding the end of such period, whichever is later. As used in this subsection, the term 'substantial product' means any single product or service which accounted for 5 per centum or more of the gross sales or revenues of a business enterprise in its most recent full fiscal year.

"(2) A business enterprise may exclude from any report made public pursuant to paragraph (1) any information or data reported to the Cost of Living Council, proprietary in nature, which concerns or relates to the amount or sources of its income, profits, losses, costs, or expenditures but may not exclude from such report, data, or information, so reported, which concerns or relates to its prices for goods and services.

"(3) Immediately upon enactment of this subsection [Apr. 30, 1973] the President or his delegate shall issue regulations defining for the purpose of this subsection what information or data are proprietary in nature and therefore excludable under paragraph (2), except that such regulations may not define as excludable any information or data which cannot currently be excluded from

public annual reports to the Securities and Exchange Commission pursuant to section 13 or 15 (d) of the Securities Exchange Act of 1934 [section 78m or 78o (d) of Title 15] by a business enterprise exclusively engaged in the manufacture or sale of a substantial product as defined in paragraph (1). Such regulations shall define as excludable any information or data which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus of the business enterprise.

"§206. Subpena power

"The head of an agency exercising authority under this title, or his duly authorized agent, shall have authority, for any purpose related to this title, to sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant books, papers, and other documents, and to administer oaths. Witnesses summoned under the provisions of this section shall be paid the same fees and mileage as are paid to witnesses in the courts of the United States. In case of refusal to obey a subpena served upon any person under the provisions of this section, the head of the agency authorizing such subpena, or his delegate, may request the Attorney General to seek the aid of the district court of the United States for any district in which such person is found to compel such persons, after notice, to appear and give testimony, or to appear and produce documents before the agency.

"§207. Administrative procedure

"(a) The functions exercised under this title are excluded from the operation of subchapter II of chapter 5, and chapter 7 of title 5, United States Code, except as to the requirements of sections 552, 553, and 555 (e) of title 5, United States Code.

"(b) Any agency authorized by the President to issue rules, regulations, or orders under this title shall, in regulations prescribed by it, establish procedures which are available to any person for the purpose of seeking an interpretation, modification, or rescission of, or seeking an exception or exemption from, such rules, regulations, and orders. If such person is aggrieved by the denial of a request for such action under the preceding sentence, he may request a review of such denial by the agency. The agency shall, in regulations prescribed by it, establish appropriate procedures, including hearings where deemed advisable, for considering such requests for action under this section: *Provided* That such agency shall issue no order which has the effect of reducing wages, or salaries in effect, or proposed to be put into effect, in an appropriate employee unit unless such order is made on the record after opportunity for a hearing. Not less than thirty days after issuance of such an order a statement of explanation shall be directed to the affected parties and made available to the public. Such statement shall include a full explanation of the reasons why the existing wage or salary, or proposed wage or salary adjustment, does not meet the requirements of or the standards established by the regulations prescribed by the agency.

"(c) To the maximum extent possible, the President or his delegate shall conduct formal hearings for the purpose of hearing arguments or acquiring information bearing on a change or a proposed change in wages, salaries, prices, rents, interest rates, or corporate dividends or similar transfers, which have or may have a significantly large impact upon the national economy, and such hearings shall be open to the public except that a private formal hearing may be conducted to receive information considered confidential under section 205 of this title.

"§208. Sanctions; criminal fine and civil penalty

"(a) Whoever willfully violates any order or regulation under this title shall be fined not more than $5,000 for each violation.

"(b) Whoever violates any order or regulation under this title shall be subject to a civil penalty of not more than $2,500 for each violation.

"§209. Injunctions and other relief

"Whenever it appears to any person authorized by the President to exercise authority under this title that any individual or organization has engaged, is engaged, or is about to engage in any acts or practices constituting a violation of any order or regulation under this title, such person may request the Attorney General to bring an action in the appropriate district court of the United States to enjoin such acts or practices, and upon a proper showing a temporary restraining order or a preliminary or permanent injunction shall be granted without bond. Any such court may also issue mandatory injunctions commanding any person to comply with any such order or regulation. In addition to such injunctive relief, the court may also order restitution of moneys received in violation of any such order or regulation.

"§210. Suits for damages or other relief

"(a) Any person suffering legal wrong because of any act or practice arising out of this title, or any order or regulation issued pursuant thereto, may bring an action in a district court of the United States, without regard to the amount in controversy, for appropriate relief, including an action for a declaratory judgment, writ of injunction (subject to the limitations in section 211), and/or damages.

"(b) In any action brought under subsection (a) against any person renting property or selling goods or services who is found to have overcharged the plaintiff, the court may, in its discretion, award the plaintiff reasonable attorney's fees and costs, plus whichever of the following sums is greater:

"(1) an amount not more than three times the amount of the overcharge upon which the action is based, or

"(2) not less than $100 or more than $1,000;

except that in any case where the defendant establishes that the overcharge was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adapted to the avoidance of such error the liability of the defendant shall be limited to the amount of the overcharge: *Provided,* That where the overcharge is not willful within the meaning of section 208(a) of this title, no action for an overcharge may be brought by or on behalf of any person unless such person has first presented to the seller or renter a bona fide claim for refund of the overcharge and has not received payment of such overcharge within ninety days from the date of the presentation of such claim.

"(c) For the purposes of this section, the term 'overcharge' means the amount by which, the consideration for the rental of property or the sale of goods or services exceeds the applicable ceiling under regulations or orders issued under this title.

"§211. Judicial review

"(a) The district courts of the United States shall have exclusive original jurisdiction of cases or controversies arising under this title, or under regulations or orders issued thereunder, notwithstanding the amount in controversy; except that nothing in this subsection or in subsection (h) of this section affects the power of any court of competent jurisdiction to consider, hear, and determine any issue by way of defense (other than a defense based on the constitutionality of this title or the validity of action taken by any agency under this title) raised in any proceeding before such court. If in such proceeding an issue by way of defense is raised based on the constitutionality of this title or the validity of agency action under this title, the case shall be subject to removal by either party to a district court of the United States in accordance with the applicable provisions of chapter 89 of title 28, United States Code.

"(b) (1) There is hereby created a court of the United States to be known as the Temporary Emergency Court of Appeals, which shall consist of three or more judges to be designated by the Chief Justice of the United States from judges of the United States district courts and circuit courts of appeals. The Chief Justice of the United States shall designate one of such judges as chief judge of the Temporary Emergency Court of Appeals, and may, from time to time, designate additional judges for such court and revoke previous designations. The chief judge may, from time to time, divide the court into divisions of three or more members, and any such division may render judgment as the judgment of the court. Except as provided in subsection (d) (2) of this section, the court shall not have power to issue any interlocutory decree staying or restraining in whole or in part any provision of this title, or the effectiveness of any regulation or order issued thereunder. In all other respects, the court shall have the powers of a circuit court of appeals with respect

to the jurisdiction conferred on it by this title. The court shall exercise its powers and prescribe rules governing its procedure in such manner as to expedite the determination of cases over which it has jurisdiction under this title. The court shall have a seal, hold sessions at such places as it may specify, and appoint a clerk and such other employees as it deems necessary or proper.

"(2) Except as otherwise provided in this section, the Temporary Emergency Court of Appeals shall have exclusive jurisdiction of all appeals from the district courts of the United States in cases and controversies arising under this title or under regulations or orders issued thereunder. Such appeals shall be taken by the filing of a notice of appeal with the Temporary Emergency Court of Appeals within thirty days of ~~the~~ entry of judgment by the district court.

"(c) In any action commenced under this title in any district court of the United States in which the court determines that a sustantial constitutional issue exists, the court shall certify such issue to the Temporary Emergency Court of Appeals. Upon such certification, the Temporary Emergency Court of Appeals shall determine the appropriate manner of disposition which may include a determination that the entire action be sent to it for consideration or it may, on the issues certified, give binding instructions and remand the action to the certifying court for further disposition.

"(d) (1) Subject to paragraph (2), no regulation of any agency exercising authority under this title shall be enjoined or set aside, in whole or in part, unless a final judgment determines that the issuance of such regulation was in excess of the agency's authority, was arbitrary or

capricious, or was otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, and no order of such agency shall be enjoined or set aside, in whole or in part, unless a final judgment determines that such order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) A district court of the United States or the Temporary Emergency Court of Appeals may enjoin temporarily or permanently the application of a particular regulation or order issued under this title to a person who is a party to litigation before it. Appeals from interlocutory decisions by a district court of the United States under this paragraph may be taken in accordance with the provisions of section 1292(b) of title 28, United States Code; except that reference in such section to the courts of appeals shall be deemed to refer to the Temporary Emergency Court of Appeals.

"(e) (1) Except as provided in subsection (d) of this section, no interlocutory or permanent injunction restraining the enforcement, operation, or execution of this title, or any regulation or order issued thereunder, shall be granted by any district court of the United States or judge thereof. Any such court shall have jurisdiction to declare (A) that a regulation of an agency exercising authority under this title is in excess of the agency's authority, is arbitrary or capricious, or is otherwise unlawful under the criteria set forth in section 706(2) of title 5, United States Code, or (B) that an order of such agency is invalid upon a determination that the order is in excess of the agency's authority, or is based upon findings which are not supported by substantial evidence.

"(2) Any party aggrieved by a declaration of a district court of the United States respecting the validity of any regulation or order issued under this title may, within thirty days after the entry of such declaration, file a notice of appeal therefrom in the Temporary Emergency Court of Appeals. In addition, any party believing himself entitled by reason of such declaration to a permanent injunction restraining the enforcement, operation, or execution of such regulation or order may file, within the same thirty-day period, a motion in the Temporary Emergency Court of Appeals requesting such injunctive relief. Following consideration of such appeal or motion, the Temporary Emergency Court of Appeals shall enter a final judgment affirming, reversing, or modifying the determination of the district court and granting such permanent injunctive relief, if any, as it deems appropriate.

"(f) The effectiveness of a final judgment of the Temporary Emergency Court of Appeals enjoining or setting aside in whole or in part any provision of this title, or any regulation or order issued thereunder, shall be postponed until the expiration of thirty days from the entry thereof, except that if a petition for a writ of certiorari is filed with the Supreme Court under subsection (g) within such thirty days, the effectiveness of such judgment shall be postponed until an order of the Supreme Court denying such petition becomes final, or until other final disposition of the action by the Supreme Court.

"(g) Within thirty days after entry of any judgment or order by the Temporary Emergency Court of Appeals, a petition for a writ of certiorari may be filed in the Supreme Court of the United States, and thereupon the judgment or order shall be subject to review by the Supreme

Court in the same manner as a judgment of a United States court of appeals as provided in section 1254 of title 28, United States Code. The Temporary Emergency Court of Appeals, and the Supreme Court upon review of judgments and orders of the Temporary Emergency Court of Appeals, shall have exclusive jurisdiction to determine the constitutional validity of any provision of this title or of any regulation or order issued under this title. Except as provided in this section, no court, Federal or State, shall have jurisdiction or power to consider the constitutional validity of any provision of this title or of any such regulation or order, or to stay, restrain, enjoin, or set aside, in whole or in part, any provision of this title authorizing the issuance of such regulations or orders, or any provision of any such regulation or order, or to restrain or enjoin the enforcement of any such provision.

"(h) The provisions of this section apply to any actions or suits pending in any court, Federal or State, on the date of enactment of this section [Dec. 22, 1971] in which no final order or judgment has been rendered. Any affected party seeking relief shall be required to follow the procedures of this title.

"§212. Personnel

"(a) Any agency or officer of the Government carrying out functions under this title is authorized to employ such personnel as the President deems necessary to carry out the purposes of this title.

"(b) The President may appoint five officers to be responsible for carrying out functions of this title of whom three shall be compensated at the rate prescribed for level III of the Executive Schedule (5 U.S.C. 5314) and two at

the rate prescribed for level V of the Executive Schedule (5 U.S.C. 5316). Appropriate titles and the order of succession among such officers may be designated by the President.

"(c) Any member of a board, commission, or similar entity established by the President pursuant to authority conferred by this title who serves on less than a full-time basis shall receive compensation from the date of his appointment at a rate equal to the per diem equivalent of the rate prescribed for level IV of the Executive Schedule (5 U.S.C. 5315) when actually engaged in the performance of his duties as such member.

"(d) (1) In addition to the number of positions which may be placed in GS-16, 17, and 18, under section 5108 of title 5, United States Code, not to exceed twenty positions may be placed in GS-16, 17, and 18, to carry out the functions under this title.

"(2) The authority under this subsection shall be subject to the procedures prescribed under section 5108 of title 5, United States Code, and shall continue only for the duration of the exercise of functions under this title.

"(e) The President may require the detail of employees from any executive agency to carry out the purposes of this title.

"(f) The President is authorized to appoint, without regard to the civil service laws, such advisory committees as he deems appropriate for the purpose of consultation with and advice to the President in the performance of his functions under this title. Members of advisory committees, other than those regularly employed by the Federal Government, while attending meetings of such committees or while otherwise serving at the request of the President may be paid compensation at rates not exceeding those authorized for individuals under section 5332 of title 5, United States Code, and, while so serving away from their homes or regular places of business, may be allowed travel expenses, including per diem as authorized by section 5703 of title 5, United States Code, for persons in the Government service employed intermittently.

"(g) (1) Under such regulations as the President may prescribe, officers and employees of the Government who are appointed, without a break of service of one or more work days, to any position for carrying out functions under this title are entitled, upon separation from such position, to reemployment in the position occupied at the time of appointment or in a position of comparable grade and salary.

"(2) An officer or employee who, at the time of his appointment under paragraph (1) of this subsection, is covered by section 8336(c) of title 5, United States Code, shall continue to be covered thereunder while carrying out functions under this title.

"§213. Experts and consultants

"Experts and consultants may be employed, as authorized by section 3109 of title 5, United States Code, for the performance of functions under this title, and individuals so employed may be compensated at rates not to exceed the per diem equivalent of the rate for grade 18 of the General Schedule established by section 5332 of title 5, United States Code. Such contracts may be renewed from time to time without limitation. Service of an individual as an expert or consultant under this section shall

not be considered as employment or the holding of an office or position bringing such individual within the provisions of section 3323(a) of title 5, United States Code, section 872 of the Foreign Service Act of 1946, or any other law limiting the reemployment of retired officers or employees.

Supreme Court, U. S.
FILED
JAN 23 1976
MICHAEL RODAK, JR., CLERK

No. 75-775

In the Supreme Court of the United States

OCTOBER TERM, 1975

MILTON J. SHAPP, GOVERNOR OF THE COMMONWEALTH OF PENNSYLVANIA, ET AL., PETITIONERS

v.

FRANK G. ZARB, ADMINISTRATOR OF THE FEDERAL ENERGY ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

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ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

Petitioners brought this action to contest an allegedly improper federal allocation of gasoline for delivery into Pennsylvania for March 1974. The district court dismissed the complaint for lack of standing, but the Temporary Emergency Court of Appeals vacated the district court's order and remanded with directions to dismiss the complaint as moot. Petitioners now contend that the case is not moot and that they have standing.

1. On March 20, 1974, petitioners brought this action for injunctive relief, alleging that in March 1974, during the fuel shortage induced by the Arab oil boycott, retail gasoline service stations in Pennsylvania received less than their proper share of gasoline. Petitioners attributed this in part to what they asserted was an incorrect allo-

cation formula used by the Federal Energy Administration (Pet. App. 7a-13a) and in part to the actions of gasoline wholesalers and refiners.

After an initial remand by the court of appeals[1] (Pet. App. 44a-48a; 510 F.2d 379), the district court dismissed the action on the ground that petitioners lacked standing. The court held that petitioners had not made "a showing of particularized harm" to themselves (Pet. App. 53a-56a) and that the case was not ripe for adjudication because petitioners had not exhausted the administrative remedies provided by federal regulations (Pet. App. 56a-57a).

The court of appeals vacated this judgment, holding that the controversy had become moot by virtue of the expiration of the Emergency Petroleum Allocation Act of 1973 (87 Stat. 627, 15 U.S.C. (Supp. III) 751 *et seq.*), the statutory authority for the program of federal control and allocation of petroleum (Pet. App. 63a-64a).[2] After Congress extended the Allocation Act through November 15, 1975,[3] petitioners requested the court to reconsider its decision. On October 30, 1975, the court denied this request (Pet. App. 65a).

On December 22, 1975, Congress enacted the Energy Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871, which amended the Emergency Petroleum Allocation Act and extended it as amended through September 30, 1981.

2. Petitioners contend that this case presents important

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[1]The district court had certified to the court of appeals the issue of standing (Pet. App. 32a-41a), but the court of appeals remanded the case to the district court to determine whether petitioners were injured within the meaning of the pertinent statute (Pet. App. 44a-48a).

[2]The Act had been extended to August 31, 1975, by Pub. L. 93-511, 88 Stat. 1608, 15 U.S.C. (Supp. IV) 753(g)(1).

[3]Pub. L. 94-99, 89 Stat. 481. The Allocation Act was extended to December 15, 1975, by Pub. L. 94-133, 89 Stat. 694.

questions concerning the standing of a State and its officers to sue the federal government "for the violation of federal statutes and regulations committed by a federal agency" (Pet. 10). But the court of appeals held that "supervening mootness prevents us from reviewing the issue of standing" (Pet. App. 63a). Thus, the only question presented is whether this case is moot. That question does not warrant review by this Court.

a. Petitioners' principal claim is that the Federal Energy Administration used erroneous data to calculate the allocation formula for determining the amount of petroleum to be delivered to retail gasoline service stations in Pennsylvania during March 1974 (Pet. App. 10a-13a). Petitioners sought an injunction requiring the Administration to recalculate the allocation formula using other data and directing respondent oil companies to deliver to their Pennsylvania customers "that additional amount of motor gasoline which this Court finds to be the amount Pennsylvania should have received, by law, in March, 1974" (Pet. App. 17a).

But the allocation program in effect during the spring of 1974 operated month-by-month; a new allocation formula was determined each month, based upon the petroleum available and a new base month (10 C.F.R. Part 211 (1974)). The petroleum allocated to Pennsylvania in March 1974 was sold to the public during that month. To order more gasoline to be allocated to Pennsylvania now would not meaningfully compensate Pennsylvania's residents for any injury caused by a shortage of gasoline during March 1974. Current allocations, which are based on current supply, are greater than current petroleum consumption. There is therefore no equitable basis for the injunctive relief petitioners request, and the case is moot.

While the Federal Energy Administration retains authority to allocate petroleum, the statutory provisions governing the exercise of that authority have changed since March 1974.[4] The regulatory framework, too, has changed. The Administration has recognized that its allocation practices initially misallocated gasoline, a problem caused in large measure because "the governing statute demanded immediate and extensive regulation of a new and complex area." *Mandel* v. *Simon*, 493 F.2d 1239, 1240 (T.E.C.A.). In *Mandel* v. *Simon* the court recognized that the Administration is "in good faith attempting to correct these inequities as promptly as they are discovered" (493 F.2d at 1240). Since the initial period of allocation, the regulations and practices have been modified and refined many times over, and the system of data collection has been significantly improved. See 10 C.F.R. Part 211 (1975).

The current allocation program is authorized by the Energy Policy and Conservation Act, *supra*, enacted on December 22, 1975, and many regulations may be changed pursuant to that Act. See note 4, *supra*. Thus, even if there were merit in petitioner's claim that March 1974 allocation to Pennsylvania under the Allocation Act was erroneous, that claim would lack sufficient immediacy to establish a presently existing controversy. See *Weinstein* v. *Bradford*, No. 74-1287, vacated as moot, December 10,

[4]Section 454 of the Energy Policy and Conservation Act (89 Stat. 950) requires the Administration to initiate a series of rulemaking proceedings, to make such changes in the allocation rules as the Administration finds warranted in light of those proceedings, and to submit a report to Congress. Petitioners are free to participate in those proceedings and to suggest changes designed to rectify the inequities they now perceive. See also H.R. Conf. Rep. No. 94-700, 94th Cong., 1st Sess. (1975), and S. Rep. No. 94-26, 94th Cong., 1st Sess. (1975), which describe other changes made by Title IV of the Energy Policy and Conservation Act.

1975; *North Carolina* v. *Rice*, 404 U.S. 244, 246; *Preiser* v. *Newkirk*, 422 U.S. 395, 401-403; *DeFunis* v. *Odegaard*, 416 U.S. 312.

b. The alterations in the statutory and regulatory scheme also moot petitioners' claims concerning the pricing, inventory, and reporting regulations. Those claims arose during the first months of administration of the allocation program. See *Mandel* v. *Simon*, *supra*. All of those regulations have been replaced. The Federal Energy Administration is currently engaged in a review of its entire allocation program pursuant to the Energy Policy and Conservation Act.

Petitioners contend that they may be aggrieved by future actions of the Administration, pursuant to the new statute and regulatory scheme. This claim is plainly premature, and in any event is outside the scope of petitioners' complaint. Section 523(a)(4) of the Energy Policy and Conservation Act (89 Stat. 962-963) provides that the Administration shall make necessary adjustments in its program, or grant exceptions to particular individuals, consistent with other purposes of the law, "to prevent special hardship, inequity, or an unfair distribution of burdens". Petitioners have failed to exhaust the administrative remedy that the new Act thus affords for any grievances that they may now have or that they may acquire.[5]

[5]See also the Federal Energy Administration Act of 1974, 88 Stat. 102, 15 U.S.C. (Supp. IV) 766(i)(1)(D), which establishes a similar administrative relief provision covering all of the Administration's regulations. This provision became effective in May 1974, after the instant suit had been commenced. See 10 C.F.R. Part 205.

If petitioners exhaust their administrative remedies, Section 523(b) of the new Act (89 Stat. 963) affords them ample opportunity for judicial review. Contrary to petitioners' claim that issues of improper allocation are "capable of repetition, and evading review" (Pet. 10), claims properly brought under such provisions have been reviewed with exemplary dispatch, consistent with the short duration of the programs involved.[6]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JANUARY 1976.

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[6]For example, in *Mandel* v. *Simon, supra,* the complaint was filed on February 20, 1974; the district court issued a preliminary injunction on the same day; the court of appeals stayed the injunction later that day, heard oral argument on February 26, and upheld the allocation program on February 27, 1974.

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-775

MILTON J. SHAPP, et al.,

Petitioners,

v.

FRANK G. ZARB, et al.,

Respondents.

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

BRIEF OF CERTAIN NON-FEDERAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

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MILTON J. SHAPP, ET AL.,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE TEMPORARY EMERGENCY COURT OF APPEALS OF THE UNITED STATES

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BRIEF OF CERTAIN NON-FEDERAL RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

———

The undersigned non-federal respondents hereby oppose petitioners' petition for a writ of certiorari on the ground that the controversy is moot and merits no further review by this Court. In support of their position, the undersigned non-federal respondents rely on and join the memorandum for the federal respondents in opposition. For the reasons stated in that memorandum, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U. S.
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In the Supreme Court of the United States

October Term, 1975
No. 75-775

MILTON J. SHAPP, Individually and as Governor of the Commonwealth of Pennsylvania, WILLIAM H. WILCOX, Individually and as State Fuel Allocation Officer of the Commonwealth of Pennsylvania, ROBERT P. KANE, Attorney General, Commonwealth of Pennsylvania, and the COMMONWEALTH OF PENNSYLVANIA, for Itself and on Behalf of Its Residents and Citizens,

Petitioners

v.

FRANK C. ZARB, Administrator, Federal Energy Office; JOHN W. WEBER, Assistant Administrator for Operations and Compliance, Federal Energy Office; JOSEPH A. LA SALA, Regional Administrator, Region III, Federal Energy Office; FEDERAL ENERGY OFFICE; ATLANTIC RICHFIELD CORPORATION; EXXON CORPORATION; SUN OIL COMPANY, INC.; GULF OIL CORPORATION; MOBIL OIL CORPORATION; TEXACO, INC.; AMOCO OIL COMPANY; ASHLAND OIL, INC. B P OIL CORPORATION; BP OIL, INC.; UNITED REFINING COMPANY; PHILLIPS OIL COMPANY; GETTY OIL COMPANY (EASTERN OPERATIONS); AMERADA HESS CORPORATION; CITIES SERVICE OIL COMPANY; AGWAY PETROLEUM CORPORATION; CHEVRON OIL COMPANY; PENNZOIL COMPANY; SHELL OIL CO.; CONTINENTAL OIL COMPANY; UNION OIL COMPANY OF CALIFORNIA; CROWN CENTRAL PETROLEUM CORPORATION; CHAMPLIN PETROLEUM COMPANY; CLARK OIL & REFINING CORPORATION; TEXAS CITY REFINING, INC.; PETROLEUM MARKETING CORPORATION; KERR-McGEE CORPORATION,

Respondents

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States.

PETITIONERS' REPLY MEMORANDUM

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TABLE OF CONTENTS

	PAGE
Petitioners Reply Memorandum	1

TABLE OF CITATIONS

CASE:

Shapp v. Simon, 523 F.2d 1405 (TECA 1975) .. 2

STATUTES:

Emergency Petroleum Allocation Act of 1973, 15 U.S.C. Section 751 et seq. 2, 3, 4, 5

Emergency Policy and Conservation Act, Pub. L. 94-163, 89 Stat. 871 et seq. 2, 3, 4, 5

MISCELLANEOUS:

121 Cong. Rec. H 12,125 et seq. 4, 5

121 Cong. Rec. S 22,480-1 5

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1975
No. 75-775

MILTON J. SHAPP, Individually and as Governor of the Commonwealth of Pennsylvania, et al.,
Petitioners

v.

FRANK G. ZARB, Administrator, Federal Energy Office, et al.,
Respondents

On Petition for a Writ of Certiorari to the Temporary Emergency Court of Appeals of the United States

PETITIONERS' REPLY MEMORANDUM

Milton J. Shapp, Governor, et al., petitioned the Supreme Court to issue a writ of certiorari to review the judgment of the court of appeals in the above-captioned matter. In response thereto, the Solicitor General filed a Memorandum For the Federal Respondents in Opposition, in which it is asserted that the petition should be denied

on the ground that "the only question presented is whether this case is moot (and) [t]hat question does not warrant review by this Court." Memorandum at 3. The Solicitor General further contends that the instant controversy is moot.[1] That the issues raised in the petition do represent questions appropriate for review by the Supreme Court already has been set out at length in the petition (at 8-18), and will not be reiterated herein. The purpose of this memorandum is to respond to the contentions of the Solicitor General that the instant controversy has been rendered moot by the alleged changes in the "regulatory framework" due to the enactment of the Emergency Policy and Conservation Act (EPCA), Pub. L. 94-163, 89 Stat. 871.

The history of the legislation extending the Emergency Petroleum Allocation Act of 1973 (EPAA) has been set forth both in the petition (at 13-15) and the Solicitor General's Memorandum (at 2). The parties are in agreement that the EPAA has continued in full force and effect through December 15, 1975. Nevertheless, the Court of Appeals held, on September 17, 1975, that:

> "This controversy has now been rendered moot by the expiration of statutory authority for the entire program of federal control and allocation of petroleum products." *Shapp v. Simon*, 523 F.2d 1405, 1407 (TECA 1975).

In enacting the EPCA, Congress merely amended the EPAA and extended it as amended through September 30,

[1] The Solicitor General's contention at pages 5-6 that the petitioners have failed to exhaust an allegedly adequate administrative remedy was neither before the Court of Appeals nor is it presently before the Supreme Court.

1981.[2] It is submitted that the EPAA never did expire and that the two statutes must now be read in pari materia.[3]

The President's authority to deal with shortages of petroleum products or dislocations in their national distribution system was established in the EPAA (15 U.S.C. §751). Section 4(a) provides a scheme prescribing the President's power to promulgate "a regulation providing for the mandatory allocation of" petroleum products in the amounts and at the prices specified in the regulation, 15 U.S.C. §753. Section 4(b)(1)(F) mandates that the regulation under Section 4(a) shall provide for the "equitable distribution of (petroleum products)[4] at equitable

[2] See Sections 451, 453 and 461, EPCA. See also Federal respondents' brief at 2.

[3] At the very least, petitioners respectfully request that this Court vacate the order of the Temporary Emergency Court of Appeals and remand the action to TECA for reconsideration in light of the recent statutory enactment.

[4] The federal respondents make the following assertion:

> "To order more gasoline to be allocated to Pennsylvania now would not meaningfully compensate Pennsylvania residents for any injury caused by a shortage of gasoline during March 1974. Current allocations, which are based on current supply, are greater than current petroleum consumption. There is therefore no equitable basis for the injunctive relief petitioners request, and the case is moot." (Respondents' brief at 3).

This contention fails for a variety of reasons, the most obvious of which is that this assertion is not a matter of record. Even, assuming *arguendo* that current gasoline supply does exceed demand, there currently exists shortages of other petroleum products. An order of court allocating more of those products to Pennsylvania would "meaningfully compensate Pennsylvania's residents" as well as Pennsylvania itself. Finally, the lower court upon remand and hearing could fashion such equitable relief as to either place

prices among all regions and areas of the United States . . . and among all users." 15 U.S.C. §753(b) (1) (F). While the EPCA has amended various provisions of the original act, the basic statutory scheme and purpose of the EPAA remains in effect today. The public policy objectives contained in Section 4(b) (1) (F) of the EPAA were extended by Congress in Section 451 of the EPCA.

The Joint Explanatory Statement of the Committee Conference (hereafter, "Conference Report") clarifies any ambiguity which may exist as to whether Congress intended to carry forward the objectives of the EPAA,[5] the noncompliance with which resulted in an inequitable allocation of petroleum products to the Commonwealth of Pennsylvania. The Conference Report explains that the EPCA "is designed to . . . insure that available supplies will be distributed equitably in the event of a disruption in petroleum imports." 121 Cong. Rec. H 12,125 (daily ed. Dec. 19, 1975). More specifically, it provides that the EPCA "extends the basic petroleum allocation authority contained in the Emergency Allocation Act . . . ." 121

Pennsylvania in as good a position as it would have been but for its injuries, or, alternatively, provide additional allocations to Pennsylvania as protection against future shortages.

[5] Congressman Dingell, Co-Chairman of the Conference, remarked:

> "This legislation would extend the Emergency Petroleum Allocation Act and provide a mechanism to convert today's mandatory controls to standby authority. A number of direct authorities are given to the President to augment his existing powers under the Allocation Act to respond effectively to a severe energy supply interruption and to provide for the attainment of the public policy objectives identified in that act."

121 Cong. Rec. H 12,593 (daily ed. Dec. 15, 1975).

Cong. Rec. H 12,126-7 (daily ed. Dec. 19, 1975); 121 Cong. Rec. S 22,480-1 (daily ed. Dec. 17, 1975).

The substantiality and importance of the questions presented in the petition have not been denied. The federal Respondents merely assert that this action is moot, an assertion which is incorrect for the foregoing reasons.[6] It is therefore respectfully submitted that this Court should grant the petition for writ of certiorari in this case to review the judgment of the courts below.

Respectfully submitted,

LAWRENCE SILVER,
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Deputy Attorneys General

ROBERT P. KANE,
Attorney General

Counsel for Petitioners.

Dated: February 10, 1976

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[6] The federal respondents have failed to cite a single provision of the EPCA which in any way suggests that a cause of action arising out of violations of the EPAA has been rendered moot by the amendments to that Act.